RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 15, 2013, 1:58 pm
BY RONALD R. CARPENTER
CLERK

No. 87282-1

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VIANNEY VASQUEZ,
Petitioner.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WASHINGTON DEFENDER ASSOCIATION

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
Vanessa Hernandez, WSBA #42770
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, Washington 98164
Telephone: (206) 624-2184

Gary Manca, WSBA # 42798
Manca Law, PLLC
108 S. Washington St., Suite 308
Seattle, WA 98104
Telephone: (206) 623-2096
Cooperating Attorney for ACLU of Washington Foundation

Suzanne Lee Elliott, WSBA #12634
WACDL Amicus Co-Chair
Suite 1300, Hoge Building
705 Second Avenue
Seattle, Washington 98104
Telephone: (206) 623-0291

Travis Stearns, WSBA #29335
Washington Defender Association
110 Prefontaine Pl. S., Suite 610
Seattle, Washington 98104
Telephone: (206) 623-4321

FILED
SUPREME COURT
STATE OF WASHINGTON
2013 FEB 25 P 12:48
BY RONALD R. CARPENTER
CLERK

ORIGINAL

TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI CURIAE 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

ARGUMENT 5

I. DUE PROCESS REQUIRES SUFFICIENT EVIDENCE TO PROVE CRIMINAL INTENT BEYOND A REASONABLE DOUBT 6

II. THE COURT OF APPEALS DISREGARDED DUE PROCESS WHEN IT FAILED TO REQUIRE SUFFICIENT EVIDENCE OF INTENT TO DEFRAUD 8

A. The Court of Appeals adopted an unconstitutional standard for reviewing the sufficiency of the evidence of criminal intent 8

B. Possession of a false instrument is insufficient, in itself, to establish intent to defraud. 10

C. Due process does not allow a finding of intent based entirely upon prejudicial speculation. 14

D. The State must prove intent to defraud before imposing felony liability 17

CONCLUSION 20

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 6

CASES

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 32 P.3d 250 (2001) 8

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ..... passim

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ..... passim

Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951) 23

Nelson v. State, 691 S.E.2d 363 (Ga. App. 2010) 14, 15

Newman v. Metrish, 543 F.3d 793, (6th Cir. 2008) (collecting cases) 18

Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) 22

People v. Bailey, 13 N.Y.3d 67, 915 N.E.2d 611 (2009) 15

People v. Brunson, 66 A.D.3d 594, 888 N.Y.S.2d 22, 23 (N.Y. App. 2009) 15

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 230 P.3d 583 (2010) 20, 21

Spokane County Fire Protection Dist. No. 9 v. Spokane County Boundary Review Bd., 97 Wn.2d 922, 652 P.2d 1356 (1982) 9

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) 17

State v. Brown, 68 Wn. App. 480, 843 P.2d 1098 (1993) 16

State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995) 12

State v. Butler, 165 Wn. App. 820, 269 P.3d 315 (2012) 11

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980) 2, 8, 10, 11

State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009)..... 24

State v. Esquivel, 71 Wn. App. 868, 863 P.2d 113 (1993) 13

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... passim

State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)..... 10

State v. Homan, __ Wn. App. __, 290 P.3d 1041 (2012) 11

State v. Ladely, 82 Wn.2d 172, 509 P.2d 658 (1973) 17

State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971 ..... 7, 8

State v. Rose, 160 Wn. App. 29, 246 P.3d 1277 (2011), *aff'd in part and rev'd in part*, 175 Wn.2d 10 (2012) 11

State v. Scoby, 117 Wn.2d 55, 810 P.2d 1358 (1991)..... 17

State v. Simmons, 113 Wn. App. 29, 51 P.3d 828, 830 (2002)..... 12

State v. Slighte, 157 Wn. App. 618, 238 P.3d 83 (2010) 11

State v. Sweany, 162 Wn. App. 223, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012)..... 11

State v. Sweany, 174 Wn.2d 909, 281 P.3d 305 (2012)..... 11

State v. Tinajero, 154 Wn. App. 745, 228 P.3d 1282 (2009) 14

State v. Turner, 167 Wn. App. 871, 275 P.3d 356 (2012)..... 11

State v. Vasquez, 166 Wn. App. 50, 269 P.3d 370 (2012)..... passim

State v. Zunker, 112 Wn. App. 130, 48 P.3d 344 (2002)..... 16

Tijani v. Holder, 628 F.3d 1071, 1075–76 (9th Cir. 2010)..... 23

Ulster County Court v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) 12

United States v. Godwin, 566 F.2d 975 (5th Cir. 1978) 13

United States v. Yemain, 468 U.S. 63, 73 n.12, 104 S. Ct. 2936, 97 L. Ed. 2d 292 (1982) 13

Velasquez v. State, 623 S.E.2d 721 (Ga. App. 2005) 15

Wash. State Health Dep't Med. Quality Health Assurance Comm'n, 166 Wn.2d 255, 208 P.3d 549 (2009) 8

STATUTES

8 U.S.C. § 1101 23

8 U.S.C. § 1182 23

8 U.S.C. § 1227 ..... 23, 24

8 U.S.C. § 1229 23

8 U.S.C. § 1255 23

Ch. 34.05 RCW 8

RCW 2.36.070 22

RCW 29A.08.520 22

RCW 9.41.047 21

RCW 9A.08.010 ..... 12, 17

RCW 9A.60.020 ..... passim

RULES

CR 50 8

CrR 3.5 9

CrR 3.6 9

OTHER AUTHORITIES

1C Torcia, Wharton on Criminal Evidence (14th ed. 1985) 11

Black's Law Dictionary (7th ed. 1999)) 10

Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753 (2011) 18

Webster's Third New International Dictionary (1969) 10

IDENTITY AND INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of civil liberties and civil rights. The ACLU supports constitutionally mandated safeguards in criminal prosecutions, such as the requirement that the prosecution prove each element beyond a reasonable doubt.

The Washington Defender Association (WDA) is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. The WDA protects and defends the constitutional rights of the criminally accused and the rights of noncitizens in the criminal justice and immigration systems.

The Washington Association of Criminal Defense Lawyers (WACDL) was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 1000 members – private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system.

The ACLU and WDA joined other organizations in a memorandum supporting the petition for review in this case.

INTRODUCTION

The standard for reviewing the sufficiency of the evidence supporting a criminal conviction is designed "to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979). Vasquez's conviction is unconstitutionally based on insufficient evidence, and the Court of Appeals' use of a constitutionally deficient standard for reviewing the sufficiency of the evidence contributed to that injustice. The correct standard of review is rooted in the due-process requirement that the prosecution prove the elements of a crime beyond a reasonable doubt, as articulated in *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) and *Jackson v. Virginia*, and as recognized in this Court's decisions in *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980), and *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980). The reviewing court must inquire whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson*, 443 U.S. at 319, a standard this Court has called "more rigorous" than the "substantial evidence" test. *Green*, 94 Wn.2d at 632. The Court of Appeals did not cite *Winship* or its progeny, instead concluding that the evidence of intent to defraud was sufficient because it was "substantial," *State v.*

Vasquez, 166 Wn. App. 50, 52, 269 P.3d 370 (2012), a standard applied to civil cases.

With a shaky foundation for its analysis, the lower court made two other critical errors. *First*, it failed to require evidence proving the element of "intent to injure or defraud" necessary to sustain a felony forgery conviction under RCW 9A.60.020(1). Instead, the Court of Appeals, ignoring the plain language of the statute, stated that that knowing possession of a forged instrument made out a prima facie case of guilt. *Vasquez*, 166 Wn. App. at 53. *Second*, the lower court substituted speculation for sufficient evidence of Vasquez's intentions. The prosecution offered no evidence that Vasquez possessed the cards in circumstances evidencing intent to defraud or actually used falsified identification cards in the past or intended to in the future. Instead, the State argued and the Court of Appeals accepted that the only value of falsified Social Security and permanent residency cards is to misrepresent a person's immigration status to employers. This argument invited speculation and a verdict based on prejudice and conjecture. In short, the Court of Appeals' analysis relieved the prosecution of its burden of proving each element of felony forgery beyond a reasonable doubt.

STATEMENT OF THE CASE

This case began with Vasquez using hand lotion at a grocery store, escalated when another man removed his wallet, and ended with him being prosecuted for a felony. *Vasquez*, 166 Wn. App. at 51–52. After noticing Vasquez sample the lotion, a private security guard brought Vasquez to an office to fill out paperwork. *Id.* at 51. The private guard took Vasquez's wallet and removed a Social Security card and permanent residency card; Vasquez did not volunteer the cards. *Id.* Vasquez acknowledged they were false when the private security guard questioned him about them. *Id.* He also acknowledged having purchased the cards in California, and, at a later point, stated that he had worked in the area. Instead of charging Vasquez with third-degree theft or misdemeanor possession of false identification cards, the prosecutor alleged Vasquez was guilty of felony forgery. To prove its case, the State needed to prove beyond a reasonable doubt that Vasquez "possesse[d], utter[ed], offer[ed], dispose[d] of, or put[] off as true a written instrument which he ... kn[e]w to be forged," RCW 9A.60.020(1)(b), and that he acted "with intent to injure or defraud," RCW 9A.60.020(1).

On review of the sufficiency of the evidence, however, the Court of Appeals did not define "intent to injure or defraud," nor did it mention the reasonable-doubt standard. *See Vasquez*, 166 Wn. App. at 52–54.

Instead, the lower court held that an inference of intent based on "logical probability" sufficed, and it stated there need be only "substantial" evidence in the record to support the jury's verdict. *Id.* at 52. The Court of Appeals applied its lesser standard of review and concluded the jury "could infer intent to defraud from [Vasquez's] possession of the fake cards and his admission that he had previously worked in the area." *Id.*

This Court granted Vasquez's petition for review. *State v. Vasquez*, 174 Wn.2d 1017, 282 P.3d 96 (2012).

ARGUMENT

I. DUE PROCESS REQUIRES SUFFICIENT EVIDENCE TO PROVE CRIMINAL INTENT BEYOND A REASONABLE DOUBT.

In re Winship, *Jackson v. Virginia*, and *State v. Green* distinguish between the standard for reviewing the sufficiency of the evidence for criminal conviction and the "substantial evidence" test for civil cases. In *Winship*, a juvenile was found guilty of a crime under a state law establishing the burden of proof as "'a preponderance of the evidence.'" 397 U.S. at 360 (quoting a New York statute). The conviction was held unconstitutional under the Due Process Clause of the Fourteenth Amendment because proof "beyond a reasonable doubt" is required to "command the respect and confidence of the community in applications of the criminal law," and to avoid the risk that an innocent person will

wrongfully "lose his liberty" and be "stigmatized by the conviction." *Id.* at 363–364, 368. The reasonable-doubt standard is materially different from the preponderance standard in the civil sphere. *Id.* at 367. The preponderance standard "is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *Id.* at 367–368 (quotation marks omitted). By contrast, the reasonable-doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id.* at 364 (quotation marks omitted).

On the heels of *Winship*, *Jackson* held a reviewing court "has a *duty* to assess the historical facts" in order to verify that the "constitutional standard" from *Winship* has been met. 443 U.S. at 317 (emphasis added). This constitutional duty requires a reviewing court to find more than a "modicum" of evidence. *Id.* at 320. The proper standard of review is whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

Before *Jackson*, this Court held in *State v. Randecker*, 79 Wn.2d 512, 487 P.2d 1295 (1971), that the standard of review was whether "there is 'substantial evidence' to support either the state's case, or the particular

element in question." *Id.* at 518. After *Jackson*, however, this Court held in *Green* that the "substantial evidence" test "cannot be equated with *Jackson*'s 'reasonable doubt' rule," which *Green* described as "more rigorous." 94 Wn.2d at 222. And in *Delmarter*, this Court again recognized that the *Randecker* "substantial evidence" test was superseded by the *Jackson* standard. *Delmarter*, 94 Wn.2d at 937–938. Perhaps contributing to the Court of Appeals' confusion below was the State's citation in its response brief of the *Randecker* "substantial evidence" standard as though it were still good law. (Br. of Resp't at 3). It is not good law, as *Green* and *Delmarter* made plain.

Green and *Delmarter* were undoubtedly correct that the *Jackson* test is more demanding. The "substantial evidence" test is employed when reviewing a jury verdict under CR 50, *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001), an administrative-agency decision under chapter 34.05 RCW, *Ames v. Wash. State Health Dep't Med. Quality Health Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009), the decision of a boundary review board, *Spokane County Fire Protection Dist. No. 9 v. Spokane County Boundary Review Bd.*, 97 Wn.2d 922, 925, 652 P.2d 1356 (1982), and the like. In short, it is a civil standard of review based on the civil burden of proof.

The "substantial evidence" test may be used for reviewing factual findings only in certain limited circumstances in criminal cases, but never when reviewing a final verdict of guilt. Trial courts apply the lower "more probable than not" standard in a CrR 3.5 hearing when determining whether an accused's confession was voluntary, and so the "substantial evidence" standard is appropriate in that context. *See, e.g.*, *State v. Broadaway*, 133 Wn.2d 118, 129–130, 942 P.2d 363 (1997). The lower standard also is proper when reviewing a trial court's findings in a suppression hearing under CrR 3.6, *State v. Hill*, 123 Wn.2d 641, 644–645, 647, 870 P.2d 313 (1994). But when the evidence at issue concerns a verdict of guilt, due process requires a firm application of the reasonable-doubt standard. *See Winship*, 397 U.S. at 364; *Jackson*, 443 U.S. at 317–318.

II. THE COURT OF APPEALS DISREGARDED DUE PROCESS WHEN IT FAILED TO REQUIRE SUFFICIENT EVIDENCE OF INTENT TO DEFRAUD

A. The Court of Appeals adopted an unconstitutional standard for reviewing the sufficiency of the evidence of criminal intent

The Court of Appeals never discussed the correct quantum of evidence necessary to satisfy the due-process principles recognized in *Winship*, *Jackson*, *Green*, and *Delmarter*. Indeed, the phrase "beyond a reasonable doubt" never appears in its opinion. *See id.* at 51–54. The

Court of Appeals framed the question as whether "the evidence of intent to defraud [was] *substantial* when we consider the reasonable inferences available to the jury," and "whether, *as a matter of logical probability*, the jury could infer intent to defraud from Mr. Vasquez's possession of these cards, his conduct, and his exchanges with the security officer." *Id.* at 52 (emphasis added). That is the wrong standard.[1] Of course, "the specific criminal intent of the accused may be inferred from the *conduct* where it is *plainly indicated* as a matter of logical probability." *Delmarter*, 94 Wn.2d at 638 (emphasis added). But an inference based on nothing more than "logical probability," while adequate in the civil sphere, is alone insufficient to sustain a finding of guilt. "[B]ecause the prosecution must prove every element beyond a reasonable doubt, the rational connection

---

[1]The Court of Appeals has misapplied the "substantial evidence" analysis in other recent cases involving the sufficiency of evidence for conviction. *See, e.g.*, *State v. Homan*, __ Wn. App. __, 290 P.3d 1041, 1042 (2012); *State v. Butler*, 165 Wn. App. 820, 829, 269 P.3d 315 (2012); *State v. Turner*, 167 Wn. App. 871, 878, 275 P.3d 356 (2012); *State v. Rose*, 160 Wn. App. 29, 32, 246 P.3d 1277 (2011), *aff'd in part and rev'd in part*, 175 Wn.2d 10 (2012); *State v. Slighte*, 157 Wn. App. 618, 626, 238 P.3d 83 (2010) ("To affirm a defendant's conviction, we need not be convinced of a defendant's guilt beyond a reasonable doubt; instead, we must be satisfied only that substantial evidence supports the conviction."). A stark example is *Butler*, where Division Three stated incorrectly that the prosecution "must produce substantial evidence to support the elements of a crime." 165 Wn. App. at 829. The court did quote part of the *Jackson–Green* test, but it omitted the portion setting the evidentiary threshold as "beyond a reasonable doubt." *See id.*

Recently, this Court reiterated that "substantial evidence" is not the appropriate standard for reviewing the sufficiency of the evidence of each alternative means of a crime. *See State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) ("Though some cases refer to the required quantum of evidence as 'substantial evidence,' the analysis has consistently been conducted according to the sufficiency of the evidence standard.") (citations omitted). Notably, the panel's opinion in this case relied on the standard that was incorrectly stated in *Sweany*. *See Vasquez*, 166 Wn. App. at 52 (emphasis added) (citing *State v. Sweany*, 162 Wn. App. 223, 233, 256 P.3d 1230 (2011), *aff'd on other grounds*, 174 Wn.2d 909, 281 P.3d 305 (2012)).

contained in a sole and sufficient inference must be true beyond a reasonable doubt." *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995) (citing *Ulster County Court v. Allen*, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)). Therefore, the question on review in this case, properly stated, is whether the evidence permits an inference of intent so logically powerful—so "plainly indicated," in *Delmarter*'s words—that a rational juror may find "intent to defraud," RCW 9A.60.020(1), beyond a reasonable doubt.

B. Possession of a false instrument is insufficient, in itself, to establish intent to defraud.

As discussed in amici's memorandum in support of the petition for review, the term "intent" in RCW 9A.60.020 is defined as "the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). The term "injure" means "'to inflict material damage or loss,'" *State v. Simmons*, 113 Wn. App. 29, 32, 51 P.3d 828, 830 (2002) (quoting Webster's Third New International Dictionary 1164 (1969)), and "defraud" has been defined as "'[t]o cause injury or loss to ... by deceit," *id.* (quoting Black's Law Dictionary 434 (7th ed. 1999)), and "'to deprive of some right, interest, or property by deceit,'" *United States v. Yemain*, 468 U.S. 63, 104 S. Ct. 2936, 97 L. Ed. 2d 292 (1982) (quoting *United States v. Godwin*, 566 F.2d 975, 976 (5th Cir. 1978)). Thus, conviction of

forgery requires proof beyond a reasonable doubt that the accused's objective or purpose was to use deceit in order to deprive or inflict material loss of a right, interest, or property.

Applying a lesser standard for the sufficiency of the evidence, the Court of Appeals stated that "the unexplained possession of a forged instrument makes out a prima facie case of guilt." *Vasquez*, 166 Wn. App. at 53. In support of this view, the lower court cited *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993), which in turn cited a treatise. But that treatise stated that "unexplained possession *and* uttering of a forged instrument" were the prerequisites to "make[] out a prima facie case of guilt" of forgery. 1C Torcia, Wharton on Criminal Evidence § 81, at 265–266 (14th ed. 1985) (emphasis added), *quoted in Esquivel*, 71 Wn. App. at 871. There is no evidence that Vasquez "uttered" (gave to another representing them as true) the identification cards at any point in time. The State's reliance on *State v. Tinajero*, 154 Wn. App. 745, 228 P.3d 1282 (2009) is similarly misplaced. In *Tinajero*, the prosecution introduced evidence that the accused actually presented falsified immigration documents to an employer. *Id.* at 748, 750. No such evidence appears in the record here.

A case directly on point is *Nelson v. State*, 691 S.E.2d 363 (Ga. App. 2010). Nelson was taken to jail, where officers inventoried his

personal items and pulled a fake $100 bill from his wallet. *See id.* at 364–365. Although the prosecution offered no evidence that Nelson had presented the bill to anyone, he was convicted of felony forgery under a state law nearly identical to RCW 9A.60.020(1), with elements of (a) knowing possession and (b) intent to defraud. *See Nelson*, 691 S.E.2d at 365. The appellate court reversed the conviction for lack of sufficient evidence because "'all that was shown was mere possession.'" *Id.* (quoting *Velasquez v. State*, 623 S.E.2d 721, 724 (Ga. App. 2005)). Other cases are in accord. *See, e.g.*, *People v. Bailey*, 13 N.Y.3d 67, 71–72, 915 N.E.2d 611 (2009) (holding that "the inference of defendant's intent from his knowledge that the bills were counterfeit improperly shifts the burden of proof with respect to intent" and "effectively stripped the element of intent from the statute and criminalized knowing possession"). *People v. Brunson*, 66 A.D.3d 594, 595, 888 N.Y.S.2d 22, 23 (N.Y. App. 2009) (rejecting as "too speculative" the prosecution theory that the accused "intended to use a false identification card to misrepresent his identity in the event of his arrest and prevent store personnel from detecting his status").

The same is true in Washington. Where a statute requires possession and intent, there must be some evidence of intent beyond simple possession. For example, Washington courts have consistently held

that the prosecution cannot prove intent to distribute a controlled substance without some facts and circumstances other than mere possession. *See, e.g., State v. Zunker*, 112 Wn. App. 130, 135–36, 48 P.3d 344 (2002); *State v. Brown*, 68 Wn. App. 480, 483-84, 843 P.2d 1098 (1993). *Brown* is particularly instructive. There, the defendant was found with 20 rocks of cocaine worth approximately $400. *Id.* at 482. The arresting officer testified that the defendant was in a "high narcotics area" and had more drugs than is commonly possessed for personal use. *Id.* at 484. The Court of Appeals reversed the conviction, calling it a case of "naked possession" as "Brown had no weapon, no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery . . . [and] the officers observed no actions suggesting sales or delivery or even any conversations which could be interpreted as constituting solicitation." *Id.* Absent facts or circumstances other than possession, the jury could not infer intent to distribute beyond a reasonable doubt. The *Brown* analysis should be applied to this case.

The State's supplemental brief suggests that the prosecution's burden was to simply prove "guilty knowledge" that the cards were false. (State's Suppl. Br. at 3.) Once again the State substitutes an unsupported argument for the constitutionally required standard of evidence beyond a reasonable doubt. Under RCW 9A.60.020(1) "intent to injure or defraud"

is a separate element from "possesses ... a written instrument which he or she knows to be forged" under RCW 9A.60.020(1)(b). So, to convict of a felony, the State was required to offer proof beyond a reasonable doubt of knowledge *and* criminal intent.[2]

C. Due process does not allow a finding of intent based entirely upon prejudicial speculation.

In this case, the circumstantial evidence was not sufficient to sustain a finding beyond a reasonable doubt of intent to defraud. "[M]ere suspicion or speculation does not rise to the level of sufficient evidence." *United States v. Stauffer*, 922 F.2d 508, 514 (9th Cir. 1990) (citation omitted). *See also Jackson*, 443 U.S. at 319 (allowing for "reasonable inferences from basic facts to ultimate facts"). Although circumstantial evidence can support a conviction, "there are times when it amounts to only a reasonable speculation and not to sufficient evidence." *Newman v. Metrish*, 543 F.3d 793, 796–797 (6th Cir. 2008) (collecting cases). This is precisely one of those times. *Amici* do not argue that forgery requires actual use of a forged instrument. *Amici* do contend, though, that due process requires any inference of intent to defraud to follow beyond a reasonable doubt from the facts and evidence in the record.

---

[2] Knowledge is a less culpable mental state than intent. See RCW 9A.08.010(1); *State v. Acosta*, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984) (discussing the "hierarchy of culpable mental states"). Accordingly, the State improperly relies on *State v. Scoby*, 117 Wn.2d 55, 61–63, 810 P.2d 1358 (1991) and *State v. Ladely*, 82 Wn.2d 172, 174–176, 509 P.2d 658 (1973), where knowledge, not intent, was at issue.

There were no facts in the record from which the jury could infer beyond a reasonable doubt that Vasquez had intent to defraud when he possessed the cards in Safeway. There is no evidence that he entered the Safeway with any anticipation that he would present identification or that circumstances would require him to do so. The record does not establish whether or not Mr. Vasquez had other identification in his wallet. Indeed, although Vasquez had the cards in his wallet, he did not present them to the Safeway security guard; it was the security guard who took Vasquez's wallet and then rummaged through it to find the cards. The events and circumstances that transpired in the Safeway did not indicate beyond a reasonable doubt that Vasquez intended to defraud anyone when he was found to possess the cards.

Other than Vasquez's bare possession of the cards, the State and Court of Appeals rely upon Vasquez's isolated comment that he had previously worked in the area. The implication, of course, is that Vasquez must have possessed the cards at the time he worked and in so doing intended to defraud his employer. But there was no evidence upon which any juror could conclude that Vasquez possessed the cards when he obtained employment or used the cards when he had obtained employment in the Yakima area. Nor did the State offered any evidence to support an inference beyond a reasonable doubt about what actually happened when

Vasquez worked. The Court of Appeals cited no evidence of Vasquez's actions or the procedures of the employers where Vasquez sought work—whether they demanded proof of immigration status or not. *See* 166 Wn. App. at 51–54. The jury was invited to import their own prejudices and assumptions about what must have happened when Vasquez sought employment in the area.

Instead of evidence, the Court of Appeals relied on the rhetorical question of "why else would Mr. Vasquez" have the cards other than "to falsely represent [his] right to legally be in the country." *Id.* at 53. As this Court has said, "[i]ssues involving immigration can inspire passionate responses," and evidence of a person's undocumented immigration status creates a "risk of unfair prejudice." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672, 230 P.3d 583 (2010). The State asserts that evidence of Vasquez's immigration status was not presented directly to the jury (State's Suppl. Br. at 16), but it certainly was indirectly: the State elicited testimony from a special agent that a Social Security number is needed to obtain lawful employment in the United States (State's Suppl. Br. at 6, 11 (citing RP 98)), and both the State and Court of Appeals have emphasized that the only reason for having the fake identification cards was to lie about the cardholder's immigration status (2RP 140). *See Vasquez*, 166 Wn. App. at 53. It was easy for the jury to infer Vasquez must have been

undocumented, and so immigration status boiled below the surface of this case. Indeed, the State's theory of the case required the jury to assume that Vasquez lacked legal status and to speculate about what happens when undocumented immigrants seek employment. Such issues "carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." *Salas*, 168 Wn.2d at 672.

This case illustrates the danger of misstating the standard for reviewing the sufficiency of the evidence. By accepting an inference based on mere "probability" as sufficient to support a finding of intent to defraud, the Court of Appeals' analysis creates the precise "risk of factual error in a criminal proceeding" that the *Jackson* was designed to prevent. 443 U.S. at 315. The reasonable-doubt standard ensures that the jury achieves a "subjective state of near certitude of the guilt of the accused," *id.*, filtering out unconstitutional convictions that are based more on speculation and conjecture instead of sufficient evidence.

D. The State must prove intent to defraud before imposing felony liability

The requirement for separate proof of criminal intent beyond a reasonable doubt is underscored by the greater punishment for a felony under RCW 9A.60.020 as compared with a misdemeanor under RCW 66.20.200(2). As noted in amici's prior memo in support of review, a

person convicted of felony forgery will lose his right to bear arms, RCW 9.41.047, to serve on a jury until his right has been restored, RCW 2.36.070(5), and to vote while under supervision by the Department of Corrections, RCW 29A.08.520. In addition, persons convicted of felonies face significant obstacles to employment and housing. *See generally* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753 (2011). The potential consequences of the Court of Appeals' ruling on the immigration status of non-citizens (including those lawfully admitted to the United States) are also far reaching. *See Padilla v. Kentucky*, __ U.S. __, 130 S. Ct. 1473, 1481,176 L. Ed. 2d 284 (2010) ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century."). Because RCW 9A.60.020 contains a *mens rea* element of "intent to injure or defraud," it qualifies as a crime involving moral turpitude under the Immigration and Nationality Act ("Act") even though it is much broader than the federal definition of fraud. *See Jordan v. De George*, 341 U.S. 223, 227, 71 S.Ct. 703, 95 L.Ed. 886 (1951); *Tijani v. Holder*, 628 F.3d 1071 (9th Cir. 2010). Convictions that are classified as crimes of moral turpitude (CIMT) under immigration law trigger both grounds of inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(II) and grounds of deportation under 8 U.S.C. §

1227(a)(2)(A)(i)&(ii). Triggering the CIMT inadmissibility ground prevents noncitizens from lawfully entering or re-entering the United States (8 U.S.C. § 1101(a)(13)(c)), bars lawful permanent residents from becoming U.S. citizens (8 U.S.C. § 1101(f)) and renders otherwise eligible noncitizens from obtaining lawful status through family members (8 U.S.C. § 1255(a)), employment (8 U.S.C. § 1255(k)) or numerous other legal avenues (e.g., 8 U.S.C. § 1229(b)(b)(1)(C)). Triggering the CIMT deportation ground results in lawfully admitted noncitizens, including lawful permanent residents and refugees being ordered deported (removed). 8 U.S.C. § 1227(a)(2)(A)(i)&(ii).

This liability for felony forgery stems from the legislature's assignment of greater culpability to those who act with "intent to injure or defraud." RCW 9A.60.020(1). Liability and culpability must converge. As Chief Justice Madsen has observed, "A solid evidentiary basis for a defendant's intent is necessary because the law requires that a defendant be held just as liable as he is culpable—no more, no less." *State v. Elmi*, 166 Wn.2d 209, 223, 207 P.3d 439 (2009) (Madsen, J., dissenting). Under the Court of Appeals' interpretation of the statute, however, an 18 year old who obtains an ID stating that he is 21 but does not use, attempt to use, or possess in circumstances evidencing an intent to use it could be convicted of forgery because "the only value of the cards would be to falsely

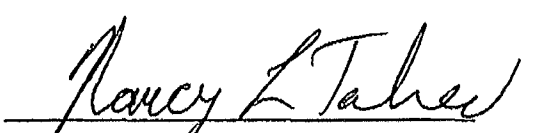
represent [the 18 year old's] right to legally [purchase alcohol]." *Vasquez*, 166 Wn. App. at 53. As a result, he would suffer the substantial consequences of felony conviction without the corresponding culpability. Under *Winship* and *Jackson*, the severe consequences of a felony conviction attach only to those proven beyond a reasonable doubt to have formed the intent that predicates the greater culpability of a felony.

CONCLUSION

The reasonable-doubt standards guards against the injustice of a person "adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *Winship*, 397 U.S. at 363 (quotation marks omitted). To protect the due-process interests at stake and to fully enforce each element of the felony forgery statute, this Court should clarify the proper standard of review and reverse.

DATED this 14th day of February, 2013

Respectfully submitted,



Sarah Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
Vanessa Hernandez, WSBA # 42770
ACLU of Washington Foundation
dunne@aclu-wa.org
talner@aclu-wa.org
vhernandez@aclu-wa.org

Gary Manca, WSBA # 42978
Cooperating Attorney for ACLU of
Washington Foundation
Manca Law PLLC
gm@manca-law.com

Suzanne Elliott, WSBA #12634
Washington Association of Criminal Defense Lawyers,
suzanne-elliott@msn.com

Travis Stearns, WSBA #29335
Washington Defender Association
stearns@defensenet.org

Attorneys for Amici Curiae

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, February 15, 2013 2:00 PM
To: 'Rebecca Azhdam'
Cc: TrefryLaw@WeGoWireless.com; James.Hagarty@co.yakima.wa.us; nancy@washapp.org; gm@manca-law.com; stearns@defensenet.org; suzanne@suzanneelliottlaw.com; Erin.Becker@kingcounty.gov; Dan.Satterberg@kingcounty.gov; Nancy Talner; Vanessa Hernandez; Sarah Dunne
Subject: RE: State v. Vasquez (No. 87282-1)

Rec'd 2-15-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Rebecca Azhdam [mailto:razhdam@aclu-wa.org]
Sent: Friday, February 15, 2013 1:44 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: TrefryLaw@WeGoWireless.com; James.Hagarty@co.yakima.wa.us; nancy@washapp.org; gm@manca-law.com; stearns@defensenet.org; suzanne@suzanneelliottlaw.com; Erin.Becker@kingcounty.gov; Dan.Satterberg@kingcounty.gov; Nancy Talner; Vanessa Hernandez; Sarah Dunne
Subject: State v. Vasquez (No. 87282-1)

Dear Clerk,

Please accept for filing in State v. Vasquez, Case No. 87282-1, the attached documents:

1. MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*;

2. BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WASHINGTON DEFENDER ASSOCIATION; and

3. CERTIFICATE OF SERVICE.

Thank you.

Rebecca Azhdam
Legal Assistant
ACLU of Washington Foundation
razhdam@aclu-wa.org
206.624.2184 ext. 222

Our address:
901 Fifth Avenue, Suite 630
Seattle WA 98164