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STATE OF WASHINGTON
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NO. 87282-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VIANNEY VASQUEZ,

Petitioner.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

A grocery store security guard stopped Vianney Vasquez after seeing him use some lotion from a bottle in the store without purchasing it. The security guard searched Vasquez's wallet and discovered two identification documents which he admitted were fake. The prosecution charged Vasquez with forgery.

Forgery requires that the prosecution prove the accused person acted with the intent to defraud when he knowingly possessed a false instrument. Did the prosecution prove that Vasquez acted with the intent to defraud when there was no evidence he used or tried to use the false identification documents?

B. STATEMENT OF THE CASE.

A Safeway security guard, Timothy Englund, saw Vianney Vasquez use some lotion that was in a bottle in the store. 2RP 43.¹ Vasquez put the lotion back on the shelf and did not take it. *Id.* Englund continued watching Vasquez as he walked through the store. *Id.* Vasquez did not do anything else inappropriate. 2RP 58. As Vasquez was leaving the store, Englund brought him to the security office for the

purpose of writing a report on Vasquez's use of the store's lotion and giving him a "courtesy release" which would warn him not to do it again. 2RP 44, 60.

Although Vasquez was cooperative and calm, Englund patted him down for weapons and searched his wallet. 2RP 45. Englund said he wanted to find a government-issued identification for Vasquez so he could verify Vasquez's identity. Id. In Vasquez's wallet, Englund found a social security card and a permanent resident card. 2RP 46. Both were in Vasquez's name but Englund suspected they were not authentic and questioned Vasquez about them. 2RP 46-47. Vasquez admitted they were false. 2RP 47-48.

Englund asked Vasquez for details about how he obtained the cards. Vasquez said he purchased the cards in California, paying \$50. 2RP 47-48. Vasquez also said he had worked "up here." 2RP 47, 76. He said he was currently unemployed. 2RP 74, 76. He never said he had ever used the cards for any purpose.

Vasquez was arrested and charged with two counts of forgery based on the two cards. CP 22. Because forgery requires the intent to

¹ The transcript from the trial on November 2, 2010 is contained within

defraud, the prosecution argued to the jury that “what purpose” would Vasquez have for those documents other than to defraud someone such as Englund or a potential employer. 2RP 140. Vasquez objected to this argument as “shifting the burden,” but the court overruled the objection. Id. Vasquez argued to the jury that he had not used the documents and had not tried to defraud anyone with them. 2RP 144. Vasquez was convicted and the Court of Appeals affirmed Vasquez’s convictions, reasoning that by knowingly possessing false identification documents without explanation, Vasquez intended to defraud someone. State v. Vasquez, 166 Wn.App. 50, 53, 269 P.3d 370, recon. denied (Mar. 7, 2012), rev. granted, 174 Wn.2d 1017, 282 P.3d 96 (2012).

C. ARGUMENT.

By merely showing that Vasquez had false identification stored in his wallet, which he did not offer or say was true, the State did not prove that Vasquez had the intent to defraud, which is an essential element of forgery.

1. Forgery requires the specific intent to defraud.

The prosecution charged Vasquez with committing forgery by alleging that on or about July 28, 2010, while acting with the intent to

Volume II of verbatim report of proceedings, and is referred to herein as “2RP,”

defraud, he knowingly possessed or put off as true a forged instrument to security guard Timothy Englund. RCW 9A.60.020(1)(b); CP 22 (amended information); CP 58, 62 (to-convict instructions).

The forgery statute expressly requires both that the perpetrator has the “intent to injure or defraud” and “~~possesses, utters, . . . or puts~~ off as true a written instrument which he or she knows to be forged.” RCW 9A.60.020(1). Statutes defining criminal offenses are given “a strict and literal interpretation.” State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). Additionally, statutes must be construed “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Accordingly, possessing a document that the accused knows to be forged is one element of forgery. RCW 9A.60.020. It must be accompanied by the separately required element of the specific intent to defraud. Id.

The intent to “defraud” is not the legal equivalent of intending to deceive or misrepresent. To intend to defraud, the perpetrator must intend to cause loss or damage. See United States v. Yerman, 468 U.S. 63, 73 n.12, 104 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). “Intent to

deceive and intent to defraud are not synonymous. Deceive is to cause to believe the false or to mislead. Defraud is to deprive of some right, interest or property by deceit.” Id. (quoting United States v. Godwin, 566 F.2d 975, 976 (5th Cir. 1978)).

~~The intent to defraud requires the intent “[t]o cause injury or~~
loss to (a person) by deceit.” State v. Simmons, 113 Wn.App. 29, 32, 51 P.3d 828 (2002) (quoting Black’s Law Dictionary, 434 (7th ed.1999)). Similarly, to “injure” means “to inflict material damage or loss on.” Id. (citing Webster's Third New International Dictionary, 1164 (1969)). “‘Intent’ exists only if a known or expected result is also the actor’s ‘objective or purpose.’” State v. Caliguri, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) (quoting RCW 9A.08.010(1)(a)).

If simple possession of a forged identification sufficed to establish forgery, the Legislature would have said so. See Delgado, 148 Wn.2d at 748 (noting Legislature “knew how to” write statute differently if it intended different result). Instead, it created a separate offense punishing possession of a forged or false identification card. A person who “possesses a card of identification not issued to him or her,”

and is not entitled to do so, is guilty of a misdemeanor, pursuant to RCW 66.20.200(2).²

If the specific intent required for forgery was broader than the intent to defraud, the Legislature would have said that. For example, ~~criminal impersonation in the first degree is defined as assuming a false~~ identity “with intent to defraud another or for any other unlawful purpose.” RCW 9A.60.040. If forgery was proved by the intent to use a false document for “any unlawful purpose,” the Legislature knew how to write a statute to express that requirement.

By requiring the intent to defraud, forgery demands proof that the perpetrator intended to cause a loss or injury by use of the forged instrument, in addition to knowingly possessing the forged document.

² RCW 66.20.200(2) provides:

Any person not entitled thereto who unlawfully procures or has issued or transferred to him or her a card of identification, and any person who possesses a card of identification not issued to him or her, and any person who makes any false statement on any certification card required by RCW 66.20.190, to be signed by him or her, shall be guilty of a misdemeanor punishable as provided by RCW 9A.20.021, except that a minimum fine of two hundred fifty dollars shall be imposed and any sentence requiring community restitution shall require not fewer than twenty-five hours of community restitution.

Numerous other jurisdictions have consistently ruled that a person who possesses fraudulent identification or other instrument but has not offered it as true has not demonstrated the required intent to defraud.

In People v. Brunson, 888 N.Y.S.2d 22 (N.Y. App. 2009), rev. denied, 13 N.Y.S. 937 (2010), store security guards found a falsified state identification card in the possession of a person caught shoplifting. The defendant had been barred from entering this store by a “no trespass” order. The appellate court ruled that the defendant’s “knowing possession of the forged card was not sufficient to prove his intent [to defraud] and he engaged in no conduct evincing an intent to use it.” Id. at 23. The Brunson Court further rejected as “too speculative to establish an element of a crime,” the prosecution’s theory that he intended to misrepresent his identity if he was arrested because he knew he had been barred from entering the store. Id.

Brunson relied on a decision from that state’s highest court involving a person caught in possession of counterfeit money after police saw him trying to pickpocket. People v. Bailey, 13 N.Y.S.3d 67, 69-70 (N.Y. 2009). The trial court inferred the intent to defraud or deceive from the “lack of any [legitimate] reason” to carry counterfeit bills. Id. at 70. The Bailey Court disagreed due to the absence of

affirmative evidence the defendant intended to use the counterfeit bills. Id. at 71-72. It refused to find that possession of fraudulent money was sufficient to prove the separately required element of the intent to defraud. Id.

The Georgia Court of Appeals addressed a similar scenario in Velasquez v. State, 623 S.E.2d 721 (Ga.App. 2005). In Velasquez, the defendant was arrested for driving without a license. In a search incident to arrest, the police found a North Carolina identification card in his wallet with the defendant's picture but a false name. Id. at 722-23. The Velasquez Court found insufficient evidence of intent to defraud. First, it explained that Georgia had a separate statute prohibiting simple possession of a false document. It reasoned that to "accept[] the State's interpretation that mere possession of a fraudulent identification card constitutes evidence of intent to defraud" would "completely subsume[]" the possession offense into fraud, and render the possession offense superfluous. Id. Second, it noted that the state did not show any "words, conduct, demeanor" or other circumstances to establish intent to defraud, instead relying on "mere speculation." Id. at 724-25.

Likewise, in People v. Miralda, 981 P.2d 676, 678 (Colo.App. 1999), the defendant possessed a forged resident alien card that accurately named and described him. When an officer saw the card in his wallet and requested to see it, the defendant handed it to him. Id. He also possessed a false social security card. Id. The prosecution offered “no proof that defendant had ever used either of the cards for any purpose.” Id. at 679. Because “mere possession of a forged instrument is insufficient to sustain a conviction,” the court held the State had not proven the required intent to defraud. Id. at 679 & n.6.

In State v. Lores, 512 N.W.2d 618 (Minn.App. 1994), the Minnesota Court of Appeals addressed whether there was probable cause to charge defendants in two consolidated cases. In one case, a car’s driver was stopped for a traffic violation. She handed a fake resident alien card to the officer as identification. Id. at 619. Later, after searching the driver’s home, the police found two false social security cards. Id. In a second case, a police officer found a counterfeit social security card when looking in the wallet of a person detained for shoplifting. Id. Both defendants were charged with forgery for the social security cards. Id. at 620.

The Lores Court concluded that both defendants merely had counterfeit social security cards in their possession. Id. The state “produced no evidence” that the defendants offered the social security cards as genuine or intended to do so. Id. at 620-21. Without an overt act beyond mere possession, the Lores Court ruled there was insufficient evidence of forgery. Id. at 621.

These cases are consistent with two Court of Appeals decisions preceding Vasquez that involved the actual use of false identification to prove the intent to defraud. In State v. Esquivel, 71 Wn.App. 868, 872, 863 P.2d 113 (1993), the defendants gave police officers counterfeit resident cards in their true names to prove their legal status. In State v. Tinajero, 154 Wn.App. 745, 748, 750, 228 P.3d 1282 (2009), rev. denied, 169 Wn.2d 1011 (2010), the defendant had used a fake social security card and permanent resident alien card to obtain a job in another person’s name.

Unlike Esquivel or Tinajero, Vasquez did not offer, use, or indicate the intent to use the identification cards stored in his wallet. As in Brunson, Bailey, Velasquez, Miralda, and Lores, a security guard located the cards in his own search of Vasquez’s property. Yet the

Court of Appeals concluded that by merely possessing forged documents, it could presume the intent to defraud. 166 Wn.App. at 53.

2. The defense does not bear the burden of disproving the intent to defraud.

The burden of proving the essential elements of a crime

unequivocally rests upon the prosecution. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. The burden of proof must be allocated correctly in order to maintain the integrity of criminal trials and to guard against wrongful convictions. Winship, 397 U.S. at 363-64. Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence that the prosecution must establish to garner a conviction. Id. at 364. It reduces the risk that factual error results in a conviction and gives “concrete substance to the presumption of innocence.” Id. at 363.

Here, the prosecution asked the jury “what other purpose” would Vasquez carry fake social security and immigration cards in his wallet other than that he had the intent to defraud someone. 2RP 140. Vasquez objected to shifting the burden of proof, but the court overruled the objection. Id. By overruling the objection, the trial court sanctioned the

prosecution's principal argument to the jury – that it could presume Vasquez's intent to defraud if he did not explain what valid purpose he had for carrying those cards in his wallet.

The Court of Appeals expressly adopted this same reasoning. It held that “why else” would Vasquez have false identification documents in his wallet other than to defraud, thus inferring intent from the “unexplained” possession of forged documents. 166 Wn.App. at 53. The prosecution may not rely on the notion that if the accused were not guilty, he would have offered evidence proving his innocence.

3. The legislature has not created a permissive inference authorizing the jury to assume the intent to defraud.

By holding that the “unexplained” possession of forged identification cards established the intent to defraud, the Court of Appeals created an inference that has not been condoned by the legislature. 166 Wn.App. at 53.

Inferences of criminal intent are disfavored in the criminal law because they dilute the State's burden of proof or shift the burden of proof to the accused. Mullaney v. Wilbur, 421 U.S. 684, 702-03 n.31, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); State v. Cantu, 156 Wn.2d 819, 826, 132 P.3d 725 (2006); U.S. Const. amend. 14; Const. art. I, §

3. Mandatory inferences violate due process because they relieve the prosecution of its obligation to prove all elements of a crime. Cantu, 156 Wn.2d at 826-27.

In Cantu, the prosecutor argued in a bench trial that burglary's statutory permissive inference permitted the judge to infer that "an illegal entry should have some explanation to it" and Cantu had not explained his forcible entry into a place he knew he was not allowed to go. Id. at 827-28; see RCW 9A.52.040.³ This Court construed the prosecution's argument and the judge's finding of guilt as indicating the judge impermissibly inferred intent based on the defendant's failure to explain that he had a lawful purpose for breaking into a portion of the house from which he had been excluded. Id. at 828.

Unlike burglary, the Legislature has not created a statutory permissive inference for forgery. Under the separation of powers doctrine, courts "cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission."

³ RCW 9A.52.040 provides:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

In re Postsentence Review of Leach, 161 Wn.2d 180, 186, 163 P.3d 782 (2007) (quoting Jenkins v. Bellingham Mun. Court, 95 Wn.2d 574, 627 P.2d 1316 (1981)).

The Legislature knows how to enact permissive inferences when it finds an inference does not offend due process. See, e.g., RCW 9A.56.060(1) (passing check knowing the account has insufficient funds “shall be prima facie evidence of intent to defraud”); RCW 9A.56.096 (fact-finder “may presume” intent to deprive unreturned rental or leased property upon notice of request to return). The absence of such a statute for forgery shows the Legislature does not authorize the fact-finder to infer intent to defraud from unexplained possession of forged documents. In fact, by requiring the intent to defraud as an essential element of forgery, and meting out misdemeanor punishment for possession of false identification under RCW 66.20.200(2), the Legislature has demonstrated that mere possession of falsified identification should not be presumed to constitute forgery.

4. Rational inferences from proven historical facts may not be unduly speculative or premised in bias.

In order to enforce the prosecution’s burden of proof, a court reviewing the sufficiency of evidence may not simply assume that a

properly instructed jury will reach the correct result as long as there is some evidence in the record that supports a conviction. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The Court of Appeals analyzed whether there was “substantial evidence” to support Vasquez’s conviction. 166 Wn.App. at 52. However, the substantial evidence test has been replaced by Jackson’s “more rigorous” review for sufficient evidence. Green, 94 Wn.2d at 222. The Court of Appeals decision improperly equates the question of “substantial evidence” with whether there was proof beyond a reasonable doubt even though these tests are not identical. Green, 94 Wn.2d at 222.

Under the more rigorous test of Jackson, reasonable inferences from the evidence are construed in favor of the prosecution but a case may not rest on speculation or conjecture. United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010). “[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government’s case.” Id. Likewise, a reasonable inference is one that rests on a logical deduction from proven facts. Eifler v. State, 570 N.E.2d 70, 75-76 (Ind. Ct. App. 1991).

A reasonable or rational inference may not rest on racial or ethnic stereotypes. The principle of due process does not condone a verdict premised on the presumption that people act a certain way based on their racial or ethnic heritage. State v. Monday, 171 Wn.2d 667, 678, 257 P.3d 551 (2011). It is “antithetical to and impermissible in a fair and impartial trial” for the fact-finder to draw on stereotypes to infer guilt. Id. (citing State v. Dhaliwal, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)); see also Salas v. Hi Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010) (noting that evidence of a person’s immigration status present “a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation.”).

The Court of Appeals presumed that “the only value of the cards would be to falsely represent Mr. Vasquez’s right to legally be in the country.” 166 Wn.App. at 53. It authorized the inference of intent to defraud based upon speculation that such documents would aid Vasquez even though there was no evidence about Vasquez’s precise legal status and Vasquez was not trying to misrepresent his legal status to Englund. It would be irrational and unreasonable to premise Vasquez’s conviction on speculation about his legal status, speculation that derived from his less than perfect English or his surname. 2RP 54,

63. Furthermore, inferring his intent to defraud based on his suspicion about his legal status incites prejudice and encourages biased application of the law.

5. Vasquez did not claim the identification documents were authentic or show he intended to use them to obtain a benefit.

Vasquez never offered the cards in his wallet to prove his identity. They were discovered by the security guard when he searched Vasquez's wallet. 2RP 56. When the guard asked Vasquez about the cards, Vasquez did not mislead him. 2RP 47. Vasquez admitted that he bought the cards from someone else, for \$50 each. 2RP 47-48.

The prosecution hinged its case on a comment that Vasquez made in the course of a lengthy conversation with Englund. 2RP 140, 153. Englund recounted that Vasquez gave his "background story," which included his statement that "he was working in the area." 2RP 49. Englund further explained that Vasquez said "he had worked in the area" and was not working "[a]t this time." 2RP 74, 76. The State seized on these remarks to infer the Vasquez must have used these identification cards to obtain that work, but there was no temporal connection between the possibility of working in the area and the possession of false identification on or about July 28, 2010. CP 22.

The prosecution also alleged that Vasquez pretended the cards were valid by reciting the social security number on the card, or admitting the cards were his. 2RP 154-55. But this fundamentally misrepresents Englund's testimony. Vasquez did not disavow owning the cards but he never said that they were authentic. 2RP 49. He did not offer the social security number on the card as his own. Englund asked Vasquez to tell him the social security number on the card and "[h]e couldn't tell me." 2RP 46. Vasquez did not pretend to know what the social security number was or assert that it was his. Id.

Vasquez neither offered the cards to Englund as proof of his identity nor said he used the documents for any purpose. Vasquez was not employed at the time Englund stopped him in the Safeway. There was no evidence he had worked recently, such as pay stubs or employment documents.

There was also no evidence about when Vasquez obtained these identification documents. There was no evidence showing Vasquez had these documents at the time he had "worked in the area."

Even if Vasquez had worked in the area recently, there was no evidence indicating what kind of work Vasquez did. He may have worked "off the books" for someone who had not asked Vasquez for

any identification documents. He may have babysat. He could have worked for a friend or relative without pay. Vasquez was merely 18 years old at the time he was arrested. CP 78. Whatever work he did was likely to be in the nature of piecemeal agricultural work without taxed wages. There was no basis to conclude that the "work in the area"

Vasquez may have done required him to use the documents in his wallet.

The prosecution offered no evidence that Vasquez intended to defraud Englund on or about July 28, 2010, when he had two false identification documents in his wallet, which was what the State charged in the information. CP 22. The prosecution encouraged the jury to convict him without actual evidence of whether he intended to use the cards in his wallet, based on his failure to disprove his intent and speculation that he could try to obtain work with these cards. Absent reasonable and rational evidence that Vasquez intended to defraud Englund on or about July 28, 2010, as he was charged, this essential element was not proven.

6. The insufficient evidence of the essential element of forgery proving the intent to defraud requires reversal of Vasquez's conviction.

Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The prosecution's failure to prove that Vasquez acted with the intent to defraud by having the two cards in his wallet requires reversal and dismissal of the charges.

D. CONCLUSION.

For the foregoing reasons, Mr. Vasquez respectfully requests this Court reverse his convictions for forgery based on insufficient evidence.

DATED this 21st day of September 2012.

Respectfully submitted,



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) NO. 87282-1-I
 v.)
)
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)
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **PETITIONER'S SUPPLEMENTAL BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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Subject: RE: 872821-VASQUEZ-SUPPLEMENTAL BRIEF

Rec'd 9-21-12

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State v. Vianney Vasquez
No. 87282-1

Please accept the attached documents for filing in the above-subject case:

PETITIONER'S SUPPLEMENTAL BRIEF

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