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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Supreme Court No. _____
(COA No. 29540-1-III)

87282-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VIANNEY VASQUEZ,

Petitioner.

FILED
APR 18 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

PETITION FOR REVIEW

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STATE OF WASHINGTON
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A. INTRODUCTION

A grocery store security guard found two identification documents in Vianney Vasquez's wallet that were fake. There was no evidence Vasquez had ever used these documents for any purpose. But he was convicted of forgery based on the theory that no person would possess false identification documents unless he planned to use them to defraud someone else, particularly when the accused person is not a United States citizen. Because the published Court of Appeals decision affirming Vasquez's convictions misconstrues the essential elements of forgery, employs an impermissible inference that shifts the burden of proof onto the accused person, and encourages anti-immigrant bias as a substitute for evidence showing the intent to defraud, the decision is contrary to the constitutional right to due process of law and this Court should accept review.

B. IDENTITY OF PETITIONER.

Vianney Vasquez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

C. COURT OF APPEALS DECISION

Mr. Vasquez seeks review of the published Court of Appeals dated January 24, 2012, for which reconsideration was denied on March 7, 2012, copies of which are attached hereto as Appendix A and B, respectively.

D. ISSUES PRESENTED FOR REVIEW

1. Forgery requires that a person act with the “intent to defraud,” which is defined as intending to cause an economic loss and is not the legal equivalent of intending to “deceive.” The Court of Appeals held that the intent to defraud may be presumed from a person’s knowing possession of false identification documents, even when those documents were never used. Does the published Court of Appeals decision relieve the State of its burden of proving the express statutory element of forgery that requires the intent to defraud?

2. Mandatory presumptions are disfavored in the criminal law. The Court of Appeals held that the fact-finder is entitled to presume that an accused person intended to defraud another based on the “unexplained” possession of false identification documents even if he never used those documents for any purpose. Does the published Court of Appeals decision create a

mandatory inference that relieves the State from its burden of proving all essential elements of forgery and shifts the burden to the accused to disprove his intent?

3. A person's status as an illegal immigrant is a topic that generates great emotional responses. The Court of Appeals decision holds that a person who is not lawfully within the United States, and who possesses false documents that may conceivably aid in that person's ability to remain in the United States, necessarily commits the crime of forgery even if he or she does not offer those documents for any purpose. Does the Court of Appeals opinion lend itself to biased decision-making and encourage anti-immigrant sentiment as a substitute for evidence showing that the accused person intended to commit the charged crime?

E. 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 did not take the lotion bottle. Englund followed Vasquez through the store but never saw Vasquez 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 took 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 false and questioned Vasquez about them. 2RP 46-47. Vasquez admitted they were false. 2RP 47-48.

Vasquez was arrested and charged with two counts of forgery based on the two false identification documents. CP 22. Because forgery requires the intent to defraud, the prosecution argued to the jury that "what purpose" would Vasquez have for those documents other than to defraud. 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

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

Vasquez's convictions, reasoning that by knowingly possessing false identification documents without explanation, Vasquez inherently intended to defraud someone. Slip Op. at 3-4. The Court of Appeals denied Vasquez's motion for reconsideration without comment.

F. ARGUMENT.

The published Court of Appeals decision holding that mere possession of a fake identification document constitutes forgery misconstrues the elements of forgery and constitutes an unconstitutional presumption of guilt

1. The Court of Appeals decision expands the essential elements of forgery contrary to its statutory definition and its interpretation by other courts.

To commit forgery as charged in this case, the State was required to prove that Vasquez acted with "intent to injure or defraud," when he knowingly possessed, uttered, or put off as true a forged instrument. RCW 9A.60.020(1)(b); CP 22 (amended information); CP 58, 62 (to-convict instructions) .

The Court of Appeals ruled that the intent to defraud is necessarily proven by evidence of a second element of forgery with a lower *mens rea*: the knowing possession of a forged instrument. See RCW 9A.09.010(2), (3) (explaining hierarchy of culpability).

Volume II of verbatim report of proceedings, and is referred to herein as "2RP."

The court held that “unexplained possession of a forged instrument makes out a prima facie case” of forgery, because “why else” would anyone have forged documents. Slip op. at 3-4. This reasoning reads out of existence the intent to defraud, which is a separate essential element of forgery and it is not the equivalent of the knowing possession of a forged document.

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)).

Forgery requires the intent to “defraud,” which is not the legal equivalent of the intent to deceive. To intend to defraud, the perpetrator must intend to cause a 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. Goodwin, 566 F.2d 975, 976 (5th Cir. 1978)).

The Legislature could have defined the elements of forgery to criminalize the mere possession of false identifications but it did not write the statute in this way. In Washington, 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

“[W]here a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute.” State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (quoting State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). As construed by the Court of Appeals, a person’s simple possession of a card of identification that was not issued to him would meet the elements of both the misdemeanor of unlawful possession of an identification

² RCW 66.20.200(2) provides:

card and the felony of forgery. It is impermissible to charge a person under the general statute when a specific offense contains the same elements. Shriner, 101 Wn.2d 580. The Court of Appeals decision runs afoul of this doctrine.

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 pulled over for driving with a broken windshield; a search after arrest turned up a North Carolina identification card bearing defendant's picture but another's name. Id. at 722-23. There was no evidence that defendant ever presented the card to another person. Id. at 724. The court found that there was 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

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.

“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, instead relying on “mere speculation.” Id. at 724-25.

Velasquez demonstrates the flaws in the Court of Appeals decision. The possession of false identification statute would be superfluous under the Court of Appeals reasoning. Furthermore, the essential element of forgery requiring the intent to defraud would also be superfluous, and the prosecution’s affirmative burden of proving the specific intent to defraud is rendered meaningless by the Court’s creation of a rule of law that possession proves the intent to defraud element of forgery.

2. The Court of Appeals decision creates a mandatory presumption that violates due process and exceeds the Court’s authority under separation of powers.

The Court of Appeals holding that “why else” would Vasquez have false identification documents other than to defraud creates an inference that the intent to defraud is established by the “unexplained” possession of forged documents. Slip op. at 4. This interpretation of the law requires that Vasquez produce evidence

that counters this inference, and impermissibly shifts the burden of proof to Vasquez. 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; see e.g., Slip op at 3-4 (holding that an “unexplained possession of a forged instrument makes out a prima facie case” of forgery).

A mandatory presumption mandates an inference of criminal intent unless it is rebutted. Cantu, 156 Wn.2d at 822. Mandatory inferences violate due process because they relieve the prosecution of its obligation to prove all elements of a crime. Id. at 826-27. Inferences are not favored in the criminal law. Id. at 826.

Cantu involved a bench trial for burglary. In that case, the prosecutor argued that based on burglary’s statutory permissive inference, the judge could 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

³ RCW 9A.52.040 provides:

argument and the judge's finding of guilt as indicating the judge employed a mandatory inference of intent because the defendant had not explained that he had a lawful purpose for breaking into a portion of the house from which he had been excluded. Id. at 828.

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." In re 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)).

Unlike burglary, the Legislature has not created a statutory permissive inference for forgery. The existence of other permissive inference statutes shows that the Legislature knows how to enact permissive inferences when it finds such 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

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.

forgery shows the Legislature does not authorize the fact-finder to infer intent to defraud from unexplained possession of forged documents. In fact, the misdemeanor punishment meted out for possession of false identification under RCW 66.20.200(2) shows that the Legislature did not intend that mere possession of falsified identification should be presumed to constitute forgery.

Similarly to Cantu, but without even a statutory permissive inference supporting its theory, the prosecutor insisted that Vasquez should be convicted because “what other purpose would someone have these forged documents in their wallet” other than the intent to defraud. 2RP 140. Vasquez objected that this argument shifted the burden of proof, but the court overruled the objection. As a result, the prosecution continued emphasizing that there was no evidence that possession of false documents was for any purpose than to defraud. Id; see also 2RP 155-56 (prosecutor again claimed possession of the cards “absolutely shows an intent to defraud”). The prosecutor also argued that “these cards are essentially misrepresentations” and by carrying them around, he demonstrated his intent to “present them.” 2RP 156. “There is no other purpose for carrying these cards.” 2RP 157.

When no statute authorizes the jury to presume the intent to defraud from the mere possession of false documents, the appellate court oversteps its authority by creating such a presumption.

3. The leap in logic underlying the Court of Appeals decision and the State's argument to the jury is predicated on inflammatory bias against non-citizens and dilution of the State's burden of proof in a manner that erodes the fairness of the trial.

A person's immigration status and ability to work lawfully in the United States "is a politically sensitive issue" and "can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." Salas v. Hi Tech Erectors, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

The Court of Appeals decision extends the tenuous reasoning of another Division Three opinion, State v. Esquivel, 71 Wn.App. 868, 863 P.2d 113 (1993). In Esquivel, the defendants offered fake identification documents, in their true names, when police officers asked for identification. Id. at 869. The trial court dismissed the forgery charges before trial on the basis that using your true name could not prove the intent to defraud, and the State

appealed. Id. at 869-70. The Court of Appeals reinstated the charges and let the case proceed.

Citing two cases that apply the statutory permissive inference for burglary cases, the Court of Appeals reasoned that “intent to defraud could be inferred from such facts and circumstances.” Id. at 872 (citing State v. Bergeron, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985); State v. Woods, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991)). As the Court of Appeals saw it,

the instruments’ only value would be to falsely represent the defendants’ right to legally be in this country. By showing the cards to the officers, they misrepresented their legal status, even though they did not misrepresent their legal names and other details about them. Their intent to defraud the specific officers is not required.

Id.

Similarly to Esquivel, the theory underlying the Court of Appeals decision and the prosecution’s argument to the jury was that even though there was no evidence Vasquez had used or planned to use the false documents to illegally work in the United States, he surely intended to do so because he was an illegal immigrant. 2RP 140. 155. The prosecutor insisted that even though “I didn’t show you any employers or anything that he used, that he used the card or gained employment . . . I would submit the

evidence is sufficient to show that intent to defraud even if I don't have the employer here."

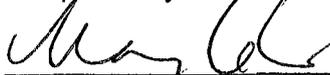
Yet Vasquez never offered the documents in his wallet, and unlike Mr. Esquivel, he never "misrepresented" his legal status to the Safeway security guard. There is no evidence he tried to defraud anyone by using those documents. The Court of Appeals opinion encourages societal bias against immigrants to substitute for evidence of the necessary intent to cause of financial harm or injury that is an essential element of forgery. RCW 9A.60.020(1)(b). This Court should accept review because the presumption employed by the Court of Appeals does not comport with the due process requirements of our constitution.

G. CONCLUSION.

Based on the foregoing, Petitioner Vianney Vasquez respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 6th day of April 2012.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

FILED

JAN 24 2012

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29540-1-III

Respondent,

Division Three

v.

VIANNEY VASQUEZ,

PUBLISHED OPINION

Appellant.

Sweeney, J. — Possession of a forged instrument is illegal if the possessor intended to defraud. Here, a forged social security card and a forged permanent resident card were seized from the defendant after he shoplifted goods from a grocery store. The question is whether this is sufficient to show intent to defraud. We conclude that the evidence is sufficient when the facts and reasonable inferences are viewed in a light most favorable to the State. We therefore affirm the convictions for two counts of forgery.

FACTS

Vianney Vasquez picked up and used a considerable amount of hand lotion at a

Safeway store in Yakima without paying for it. He then went to the front of the store and looked at the movie display for a long time. Timothy Englund was the Safeway store security guard. He approached Mr. Vasquez and identified himself as such.

Mr. Englund ushered Mr. Vasquez into the store's management office to fill out paperwork for shoplifting. He asked Mr. Vasquez for his name, address, telephone number, height, weight, age, hair color, and eye color. Mr. Englund then patted down Mr. Vasquez for weapons and to locate identification. He found Mr. Vasquez's wallet and it contained a social security card and a permanent resident card.

Mr. Vasquez said he got the social security card and permanent resident card from a friend in California for \$50 each. He admitted that the cards belonged to him and were fakes. The cards listed his real name, Vianney Vasquez. Mr. Vasquez said he had previously worked in the area. Mr. Englund called the police because he could not verify Mr. Vasquez's identity.

The State charged Mr. Vasquez with two counts of forgery for the fake social security card and permanent resident card. Mr. Vasquez moved to dismiss the charges and argued that he had not offered the cards, they were taken from him, and therefore the State had not shown the intent to defraud. The court denied the motion and the matter proceeded to trial. A jury found Mr. Vasquez guilty on both counts.

DISCUSSION

Mr. Vasquez contends here, as he did in the trial court, that the State has failed to show that he intended to injure or defraud by his possession of these forged documents.

So the question then becomes 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. Said another way, is the evidence of intent to defraud substantial when we consider the reasonable inferences available to the jury.

State v. Sweany, 162 Wn. App. 223, 233, 256 P.3d 1230 (2011).

The State had to show intent to injure or defraud by Mr. Vasquez's possession of these forged cards. Under the statute, “[a] person is guilty of forgery if, with intent to injure or defraud . . . [he] *possesses*, . . . a written instrument which he knows to be forged.” Former RCW 9A.60.020(1)(b) (2003) (emphasis added). A forged instrument is “a written instrument which has been falsely made, completed, or altered.” RCW 9A.60.010(7). The intent to commit the crime of forgery may be inferred from surrounding facts and circumstances if such intent is “a matter of logical probability.” *State v. Esquivel*, 71 Wn. App. 868, 871, 863 P.2d 113 (1993) (quoting *State v. Woods*, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)). Indeed, *Esquivel* suggests that the unexplained possession of a forged instrument makes out a prima facie case of guilt

against the possessor because forgery does not require that anyone actually be defrauded. *Esquivel*, 71 Wn. App. at 871. And here why else would Mr. Vasquez have them.

Mr. Vasquez, nonetheless, asserts that since he never presented his identification cards to Mr. Englund, there is no evidence that he possessed the cards with intent to defraud. He distinguishes *Esquivel* by pointing out that there the defendant actually presented the forged documents. *Id.* at 869.

In *Esquivel*, two separate defendants in the consolidated case showed police fake immigration cards. *Id.* They admitted that the documents were forged but maintained that they did not intend to defraud since all of the information listed on the cards was truthful. *Id.* at 870. We rejected the argument, concluded that there was no other reason to have the cards, and upheld the forgery convictions: “Indeed, the instruments’ only value would be to falsely represent the defendants’ right to legally be in this country.” *Id.* at 872.

Here, the cards belonged to Mr. Vasquez and were fakes. The cards had his real name on them but someone else’s social security number. Mr. Vasquez reported that he had previously worked in the area. Like the immigration cards in *Esquivel*, the only value of the cards would be to falsely represent Mr. Vasquez’s right to legally be in the country. The jury here could reasonably infer intent to defraud from his possession of the

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fake cards and his admission that he had previously worked in the area.

We conclude there is sufficient evidence to support the convictions for forgery when the evidence is viewed in the light most favorable to the State.

We affirm the convictions.

Sweeney, J.

WE CONCUR:

Kulik, C.J.

Brown, J.

APPENDIX B

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 29540-1-III
Respondent,)	
)	
v.)	
)	ORDER DENYING
VIANNEY VASQUEZ,)	MOTION FOR
)	RECONSIDERATION
Appellant.)	

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of January 24, 2012, is denied.

PANEL: Judges Sweeney, Kulik, Brown

DATED: March 7, 2012

FOR THE COURT:



 TERESA C. KULIK
 Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.) COA NO. 29540-1-III
)
VIANNEY VASQUEZ,)
)
)
APPELLANT.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF APRIL, 2012.

x _____ 