

65465-9

65465-9

NO. 65465-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TYSON SPRING,

Appellant.

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

BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

FILED
COURT OF APPEALS
DIVISION ONE
JAN 20 2011

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. 1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT8

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TYSON SPRING OF THEFT IN THE FIRST DEGREE.8

 a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt..8

 b. The State did not prove Mr. Spring had the intent to deprive another of property under a theory of unauthorized control. 10

 c. The prosecution’s failure to prove all essential elements requires reversal..... 12

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TYSON SPRING OF FORGERY. 13

 a. The evidence was insufficient to convict Mr. Spring of forgery..... 13

 b. The prosecution’s failure to prove all essential elements requires reversal..... 17

3. THE TRIAL COURT VIOLATED MR. SPRING’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY DENYING HIS REQUEST TO PRESENT AN ESSENTIAL EXPERT WITNESS. 18

 a. The federal and state constitutions guarantee the accused the right to present a defense..... 18

b.	The proffered expert testimony was relevant to Mr. Spring's defense and would have been helpful to the jury.	20
c.	The trial court's refusal to permit Mr. Spring to call an expert witness violated his right to present a defense.	23
d.	Since precluding Mr. Spring's opportunity to call a defense witness was an error that cannot be viewed as harmless, reversal must be granted.	24
4.	THE TRIAL COURT VIOLATED MR. SPRING'S EQUAL PROTECTION RIGHTS, CHARGING HIM WITH THE MORE GENERAL FELONY OF FORGERY, RATHER THAN THE SPECIFIC MISDEMEANOR GOVERNING CAR DEALERS.	25
a.	Where a defendant's conduct is proscribed by a general and a specific statute, the State may charge only the specific statute.	26
b.	RCW 46.70.180(12)(b) and forgery are concurrent statutes	27
c.	The forgery convictions must be reversed.	29
F.	CONCLUSION.	30

TABLE OF AUTHORITIES

Washington Supreme Court

Reese v. Stroh, 128 Wn.2d 300, 907 P.2d 282 (1995).21, 22, 24

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984)..... 9

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997).....25

State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) 23, 24

State v. Cann, 92 Wn.2d 193, 595 P.2d 912 (1979)26, 27

State v. Chase, 134 Wn. App. 792, 142 P.3d 630 (2006)26, 27,
28, 29

State v. Conte, 159 Wn.2d 797, 154 P.3d 194, cert. denied, 552
U.S. 992 (2007)26

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) 8

State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982).....27, 30

State v. Green, 4 Wn.2d 216, 616 P.2d 628 (1980)..... 9

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 19

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995)23, 24, 25

State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984)26, 28, 29, 30

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997).....24

Washington Court of Appeals

State v. Heffner, 126 Wn. App. 803, 110 P.3d 219 (2005).....29

State v. Presba, 131 Wn. App. 47, 126 P.3d 1280 (2005)26

<u>State v. Prestegard</u> , 108 Wn.App. 14, 28 P.3d 817 (2001).....	10
<u>State v. Soderholm</u> , 68 Wn. App. 363, 842 P.2d 1039 (1993) 14, 16	
<u>Stevens v. Gordon</u> , 118 Wn. App. 43, 74 P.3d 653 (2003).....	24

United States Supreme Court

<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)	19
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974)	19
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).....	19
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	8
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	9, 13, 17
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), <u>reversed on other grounds</u> , <u>Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).....	13, 18
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	9
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	19

Statutes

RCW 46.70.005-RCW 46.70.920.....	27
RCW 46.70.170.....	28

RCW 46.70.180(12)(b).....	28, 29
RCW 9A.60.020(1)(a),(b).....	10, 13, 17, 18
RCW 10.52.040.....	19

Federal Courts

<u>United States v. Bautista-Avila</u> , 6 F.3d 1360 (9 th Cir. 1993).....	9
<u>United States v. Lopez</u> , 74 F.3d 575 (5 th Cir. 1996).....	9

Washington Constitution

Article 1, § 3.....	9
---------------------	---

United States Constitution

U.S. Const. amend. 5.....	13, 17
U.S. Const. amend. 14.....	9, 26

Rules

ER 702	20, 22, 24
--------------	------------

Other Authorities

5B Karl B. Teglund, Washington Practice, Evidence Law & Practice, sec. 702.1, at 31 (4 th ed. 1999).....	20
Am.Jur.2d , §§ 4, 49, 52.....	23
Uniform Commercial Code (UCC).....	8, 21, 22, 23, 24, 25

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Spring intended to deprive another of property received from sale of such property.

2. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Spring, with the intent to injure or defraud, offered a written instrument which he knew to be forged.

3. Mr. Spring's right to receive a fair trial was violated where the trial court improperly denied his request to qualify a defense witness as an expert in commercial law and the UCC.

4. Mr. Spring was convicted of forgery under a statute that is concurrent with a regulation governing the conduct of car dealers, which is an unclassified misdemeanor as contained in RCW 46.70.170.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense. Must Mr. Spring's convictions for theft in the first degree be reversed and dismissed where the State failed to prove beyond a reasonable

doubt that he intended to intended to deprive individuals of their property, or of the funds received from the sale of their property?

2. Must Mr. Spring's convictions for forgery be reversed and dismissed where the State failed to prove beyond a reasonable doubt that he intended to injure or defraud another individual by offering a written instrument which he knew to be forged?

3. The accused has the constitutional right to present a defense. Where the trial court did not allow Mr. Spring to call an expert witness in the area of commercial law and the UCC, an area crucial to his defense, did this violate Mr. Spring's right to present a defense?

4. Equal protection requires that offenders who commit the same types of misconduct must be subject to the same potential punishment. Where a prosecutor may elect which statute to charge based on unfettered whim or dislike for the particular offender, equal protection may be violated. Where Mr. Spring was prosecuted under statutes which are concurrent, must the convictions under the more general statutes be vacated?

C. STATEMENT OF THE CASE

Tyson Spring, with the assistance of his family and a great deal of initiative and hard work, started his own luxury automobile

consignment dealership in early 2003. RP 1200-28.¹ Mr. Spring had spent several years working on the sales floors of other dealerships and had learned the business from the ground up. RP 1204-12. After researching and forming a detailed business plan, he consulted with an experienced business advisor and signed for a beautiful showroom on First Avenue in Seattle, opening Auto Gallery of Seattle (AGS) in mid-2003. RP 1222-30.

Mr. Spring's start-up costs were largely supported by his parents, particularly by his step-father, Michael Lamb, a Seattle businessman. RP 1156-65. Mr. Spring's parents initially gave him \$50,000 toward the business, as well as co-signing AGS's line of credit at the bank for \$150,000, which could be increased to \$185,000. Mr. Lamb also co-signed the First Avenue showroom lease, which cost approximately \$9,500 per month, including utilities. RP 1241. Mr. Spring's parents believed their son had created a good business plan, and with the business advisor they had provided to him, their investment was a sound one. RP 1165.²

¹ The verbatim report of proceedings consists of ten volumes of consecutively paginated proceedings, from February 8, 2010 to April 23, 2010. The proceedings will be referred to herein as RP ____.

² Mr. Spring testified that although AGS was initially bringing in over \$100,000 per month, he was barely covering his rent – a fact he did not realize at the time. RP 1241. Mr. Spring noted that his rent including utilities was \$9,500 per month, but the business plan had estimated rent at only \$3,500 per month.

Once AGS was open for business, Mr. Spring received his dealer's license from the Department of Licensing (DOL) and began acquiring luxury automobiles at auction and on consignment. RP 1233-38. By 2004, AGS was an unqualified success, sponsoring the Magnolia Auto Show, holding networking events and art shows at its gallery space, and making a larger profit than projected. RP 548, 1167-69, 1239-40. During 2004, Mr. Spring was selling \$200,000 in cars per month, putting many deals together between friends and acquaintances in automobile networking circles. RP 416-19, 507-10, 1244.

2005 was a difficult year for AGS, however. RP 1170. The market changed and AGS began to fall behind in paying its expenses, including its salaries and its own consignors. RP 1170-71. The death-knell of AGS was the day in early 2005 that a customer took a Ferrari on a test-drive and crashed the car in the Battery Street Tunnel – an accident that almost killed the customer, as well as Mr. Spring in the passenger seat. RP 1152-58. The customer had used a fraudulent credit report, and Mr. Spring was

left with a loss on the Ferrari of close to \$80,000. RP 1259-61.³ As a result of the test-drive accident, AGS's insurance rates more than doubled. RP 1261. Mr. Spring fell behind in paying his consignors promptly, following the sales of their vehicles, and he began to have trouble balancing his books. RP 1170-71. AGS had lost its bookkeeper, and as a small business owner with a low profit margin, Mr. Spring found he was soon unable to cover his remaining few employees' salaries, the rent, and the utilities, as well as promptly paying consignors. RP 1172-74.⁴

Mr. Spring attempted to pay off consignors by borrowing increasing amounts from his parents, who attempted to bail out his business by extending him several additional loans. RP 1170-72. By fall of 2005, Mr. Spring had liquidated all of his own assets, including a Roth IRA worth \$13,500 and refinancing his two homes. RP 1268. This injection of almost \$90,000 into AGS was accompanied by two additional contributions of \$49,000 by Mr.

³ Mr. Spring's insurance company covered only \$33,000 of the \$55,000 damage to the Ferrari; Mr. Spring paid for the remainder of the work out of AGS's checking account. RP 1259-61. Since re-sale of a previously totaled Ferrari was impossible, Mr. Spring was forced to sell the car at a loss to a rental car agency with full disclosure of its accident history. RP 1260-61.

⁴ Mr. Spring stated that in 2004 he drew a personal salary of approximately \$55,000 to \$60,000, and thereafter he drew no salary whatsoever, and only paid health insurance for his wife and son. RP 1245, 1319.

Spring's parents in late 2005, in an attempt to compensate consignors. RP 1270. As Mr. Spring stated, "It went from so good to so bad so fast that I was doing anything and everything I could to make it work." RP 1269.⁵

By early 2006, however, the business was failing. The DOL had received a number of complaints from consignors who had not received payment for their cars upon sale, and from buyers who had not received titles upon the expiration of their temporary "dealer plates." RP 340-42, 943, 946.⁶ DOL investigator Bill Smith conducted an audit of AGS in March 2006 and examined Mr. Spring's records and inventory. RP 340-42.

The DOL found that AGS was out of compliance with DOL regulations requiring automobile dealers to keep trust accounts in order to cover obligations to consignors. RP 943-45. Due to this and other examples of bookkeeping irregularities, Mr. Spring

⁵ In addition to consignment deals, in late 2005, Mr. Spring imported a rare and virtually new BMW M6 from Germany, priced at \$90,000, and had it shipped to Seattle. RP 646-50. For this deal, he received financing from the American Marine Bank, which was also considering making a commercial loan to AGS. Id. AGS defaulted on the loan (count 13). RP 667-69.

⁶ Witnesses testified at trial that they had not received full payment for their consigned automobiles from AGS, or had not had their credit union or bank loans paid off as they had expected. RP 232, 394-97, 517-18, 567-68, 758-60, 855. Buyers of AGS automobiles stated that their temporary "dealer plates" had expired, and that they had never received titles with which to properly register their cars. RP 420-22, 695-97, 733-36, 869-70.

voluntarily surrendered his dealer's license to the DOL on June 14, 2006. RP 946. Lawsuits were already streaming in against AGS and against Mr. Spring personally, and he decided to retain counsel; David Smith of Garvey Schubert Barer began to represent Mr. Spring in May 2006. RP 1315.

David Smith advised Mr. Spring to close down the business, and worked with the DOL to negotiate settlements with the aggrieved buyers and sellers, attempting to put titles into the right hands. RP 1312-13, 1498-1505. Unfortunately, in the midst of the settlement process, the Seattle Police Department began to seize automobiles from "good faith buyers," telling these buyers that the cars were stolen property. RP 697, 871, 887-90. The police also arrested Mr. Spring, despite the fact that he was in the process of paying back his creditors. RP 1337-39, 1430-33. Once media coverage began, a search warrant was served at the AGS premises, and Mr. Spring was charged, he could no longer communicate settlement offers to his customers – some of whom he had already begun to pay back – and all of the civil remedies commenced by attorney David Smith came to a halt. RP 1337-39, 1430-33.

Tyson Spring was charged with thirteen counts of Theft in the First Degree and four counts of Forgery for conduct related to odometer disclosure and release of interest documents. CP 45-54.

At trial, Mr. Spring, represented by a public defender, called his previous defense counsel, David Smith, as a witness. Mr. Spring made an offer of proof, stating that he intended to have Mr. Smith qualified as an expert witness in matters of commercial law and the Uniform Commercial Code (UCC). RP 1458-60. The court denied this application and did not permit Mr. Smith to be qualified as an expert witness. RP 1490-92.

Mr. Spring was convicted of twelve counts. CP 126-28.

This appeal follows. CP 153-62.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TYSON SPRING OF THEFT IN THE FIRST DEGREE.

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the

prosecutor derives from the guarantees of due process of law contained in Article I, Section 3 of the Washington Constitution⁷ and the Fourteenth Amendment to the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. 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, 616 P.2d 628 (1980).

When an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for

⁷ Art. I, section 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

upholding a jury's guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. The State did not prove Mr. Spring had the intent to deprive another of property under a theory of unauthorized control. In counts 1-3, 5, 7-8, and 10, the State was required to prove two elements: (1) that Mr. Spring exerted unauthorized control over the property of another; and (2) that with the property of another in his possession or control, as trustee, he withheld or appropriated that property to his own use. RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(a).

Here, the State produced several witnesses who testified that they had consigned automobiles with AGS. Each witness stated that he or she had voluntarily entered into a consignment agreement with Mr. Spring, as a representative of AGS. RP 217, 367-70, 507-10, 543, 592, 743-47, 842-45. Mark Horne, for example (count 8), stated that in 2005, he decided to consign his 2003 Corvette Roadster with AGS because he had moved to Alaska and no longer drove the car. RP 212-20. Mr. Horne testified that he entered into a consignment agreement with AGS, by which Mr. Horne agreed to accept \$42,000, less the balance owed to GMAC financing, once AGS sold the Corvette. RP 217-

20; Ex. 33. Mr. Horne stated that he voluntarily entered into the consignment agreement and that “we both signed.” RP 218. Mr. Horne’s understanding was that if Mr. Spring sold the car for over \$42,000, Mr. Spring would be entitled to keep the overage, plus any expenses, as commission. RP 219.

Following Mr. Horne’s entrance into the consignment agreement, he left his Corvette with Mr. Spring and returned to Dutch Harbor, Alaska – a remote area located on the Aleutian chain. RP 220. He checked in on the progress of his car sale only periodically – once every few months by either phone or email – in his estimation, “not too often.” RP 220. As a consequence, when the payment from AGS was delayed – following the sale of the Corvette to Roy Robinson Chevrolet -- Mr. Spring admittedly did not promptly notify Mr. Horne, with whom he was not in regular contact. RP 1328. Mr. Spring testified that his intention was simply to stall for time in order to eventually fully compensate Mr. Horne with interest. RP 1328.

Similarly, the evidence of Mr. Spring’s intent to deprive Mr. Horne of his property – here, the Corvette -- was patently equivocal, and the State failed to prove his intent to exert unauthorized control over the property of Mr. Horne, or to appropriate it for his own use.

Therefore, the trial court's conclusion that Mr. Spring was guilty of theft in the first degree was not supported by the evidence.

Each of the additional complaining witnesses named in the unauthorized control counts told a similar story, and for the reasons stated above, these convictions of theft in the first degree are similarly insufficient.⁸ Each consignor stated that he or she voluntarily entered into a consignment agreement with AGS and voluntarily left his or her vehicle in the care of Mr. Spring. RP 217, 367-70, 507-10, 543, 592, 743-47, 842-45.

Mr. Spring presented abundant evidence of a financially troubled small business attempting to stay afloat in an increasingly hostile environment. RP 1170, 1180-81, 1267-74. Mr. Spring's repeated attempts to reach out to consignors and to engage in settlement agreements, both formal and informal, indicate the opposite of an intent to permanently deprive the consignors of their property. RP 1321-23, 1334, 1337-39, 1342, 1376.

c. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction

⁸ Witnesses on these counts included the following: Count 1 (Craig Klinkham), Count 2 (Zachary Namie), Count 3 (Michael King), Count 5 (Candice Oneida), Count 7 (Joel Sloss), and Count 10 (David McKim).

and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an essential element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The State failed to prove beyond a reasonable doubt that Tyson Spring intended to deprive the consignors of their property by exercising unauthorized authority over their property, an essential element of the charged offense of theft in the first degree. Absent proof of every essential element, the convictions must be reversed and the charges dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TYSON SPRING OF FORGERY.

a. The evidence was insufficient to convict Mr. Spring of forgery. The State was required to prove that, with the intent to injure or defraud, Mr. Spring offered written instruments which he knew to be forged. RCW 9A.60.020(1)(a),(b). Mr. Spring was charged with offering forged odometer disclosure/release of title forms and affidavit of loss/release of interest forms as to Mark

Horne (counts 14 and 15). CP 45-54. Because there was no evidence that Mr. Spring intended to defraud Mr. Horne by offering these documents to facilitate the sale of Mr. Horne's vehicle without his consent, and because these documents were consistent with Mr. Horne's intentions, these forgery convictions must be reversed and dismissed.

In State v. Soderholm, this Court examined a case in which a contractor argued that he was authorized to sign his employer's name on a property owner's affidavit in order to get building permits from the county. 68 Wn. App. 363, 374, 842 P.2d 1039 (1993). In Soderholm, as in the instant case, the defendant argued that he was acting as an authorized agent for the individual whose name was signed. Id. The complaining witness in Soderholm testified that her husband would be out of town during much of the permit application process, and thus she asked the defendant to "handle all of that, because I knew nothing about it." 68 Wn. App. at 374.

Here, Mr. Horne testified that he was living in a remote part of Alaska, and was only periodically getting his mail in Seattle – once approximately every six months. RP 254-55. Mr. Horne stated that he knew that Mr. Spring was going to need to prepare a lost title affidavit on his behalf, because the actual title was missing:

I had an idea that we were going to get a lost [sic] because we didn't have the title. I don't believe I ever got the title from GMAC, and we were going to do an affidavit of lost title. That is what I was under the understanding what we would be doing, to get the title.

RP 231.

Mr. Horne stated that he never received a letter from GMAC stating that they no longer had an interest in his Corvette, although he also admitted that he might have received it and thrown it away. RP 254. He admitted that Mr. Spring then sent him some documents to sign, in order to obtain the lost title to deliver to the buyer, Roy Robinson Chevrolet. Id. Mr. Horne agreed that he signed these documents in order to get the lost title, although not to release interest, and that he sent the documents by mail to Mr. Spring. RP 255-56.⁹

Mr. Spring never received the documents, as AGS had closed its doors before the documents arrived by mail from Alaska. RP 1328. More importantly, however, Mr. Spring's intention by preparing the documents for Mr. Horne was clear from his own statements:

At the time I signed these document(s), Mark Horne had already signed the same exact documents and returned them to me in e-mail. So, I did feel like I was authorized to do that. I was trying to hold the deal together. They were threatening to unwind the deal ... and I knew that the documents were in route, so I did think that I was authorized to sign those documents.

RP 1416.

As in Soderholm, where the defendant signed the owner's affidavit believing he was authorized to sign the documentation, Mr. Spring was working as Mr. Horne's agent. 68 Wn. App. at 374. Although this Court held that the defendant in Soderholm acted without authority to sign the principal's name, the cases are distinguishable. 68 Wn. App. at 374-75. In Soderholm, this Court held that a rational trier of fact could have found that the defendant signed the owner's name to the permit application in order to perpetrate a fraud – in that case, in order to conceal the fact that he was not a licensed contractor. 68 Wn. App. at 375.

Here, however, the evidence was clear from both Mr. Horne's and Mr. Spring's testimony that the signatures on the odometer disclosure and release of interest forms were only

⁹ Mr. Spring stated that he had sent Mr. Horne a packet containing both odometer disclosure/release of title forms, as well as affidavit of loss/release of interest forms, and that Mr. Horne signed and returned all of them -- both

offered in order to expedite the sale of Mr. Horne's vehicle. Mr. Horne testified that he had already signed identical forms and placed them in the mail to Mr. Spring, thus evincing his consent to the content of the very forms he later claimed to be forged. RP 231, 255-56. Mr. Spring testified that he offered the odometer disclosure and release of interest forms precisely because Mr. Horne had already authorized him to do so -- both electronically and by telling him that he had signed and placed the forms into the mail. RP 1416.

Mr. Spring offered documents, as authorized as the principal's agent, with the intention of fulfilling the principal's goal: selling his car. This is the very opposite of the *mens rea* required under the forgery statute, which is acting with the intent to injure or defraud. RCW 9A.60.020(1)(a),(b).

b. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an essential

electronically and by regular mail. RP 1328, 1416.

element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The State failed to prove beyond a reasonable doubt that, with the intent to injure or defraud Mr. Horne, Mr. Spring offered written instruments which he knew to be forged. RCW 9A.60.020(1)(a),(b). Absent proof of every essential element, the convictions must be reversed and the charges dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

3. THE TRIAL COURT VIOLATED MR. SPRING'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY DENYING HIS REQUEST TO PRESENT AN ESSENTIAL EXPERT WITNESS.

a. The federal and state constitutions guarantee the accused the right to present a defense. The federal and state constitutions guarantee every person accused of a crime the right to present a defense. This right is derived from (1) the guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3,

22; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also RCW 10.52.040; CrR 6.12.

A defendant must be permitted both to introduce relevant, probative evidence and to cross-examine the State's witnesses in a meaningful fashion. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). As the Court said in Maupin,

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental aspect of due process of law.

Maupin, 128 Wn.2d at 924 (citing Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (reversing conviction where defendant was denied the right to call relevant defense witness, finding denial of right to compulsory process)). In Mr. Spring's case, the denial of his request to qualify his defense

witness as an expert was an unreasonable burden on his right to present a defense.

b. The proffered expert testimony was relevant to Mr. Spring's defense and would have been helpful to the jury. The right to present witnesses is limited only to the extent that it does not embrace the right to present irrelevant evidence. Maupin, 128 Wn.2d at 925. The trial court has the discretion to determine whether evidence is relevant. However, a defendant's inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. Maupin, 128 Wn.2d at 924.

Under ER 702, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. See 5B Karl B. Tegland, Washington Practice, Evidence Law & Practice, sec. 702.1, at 31 (4th ed. 1999). This involves a two-step inquiry by the trial court: the court must first determine whether a witness is qualified by his or her expertise as an expert; then the court must determine whether the witness's expertise would be helpful to the

trier of fact. Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).

Here, the trial court found that Mr. Spring's former attorney, David Smith, was qualified to be an expert witness as to commercial law and the UCC. RP 1466-67. In response to defense counsel's offer regarding Mr. Smith's qualifications, the trial court stated, "No question. I assume that." RP 1466. Defense counsel then asked to make an offer of proof, stating that he intended to call David Smith as not only a transactional witness, but also as an expert witness on the UCC, in order to elaborate on the American Marine Bank deal involving the new BMW imported from Germany (count 13). RP 1467-68.¹⁰

A former bank officer from American Marine Bank, Christine Christoff, had testified during the State's case that she had authorized a loan to AGS for \$68,000 toward the purchase of the BMW, valued at approximately \$90,000. RP 651-57. The car was shipped to Seattle with a certificate of origin in early 2006, and the bank ultimately was not able to collect on its loan to AGS. The

¹⁰ Defense counsel preserved this issue upon the trial court's preliminary denial of the motion, noting that the court's ruling was critical, and "kind of eviscerates the testimony before the jury." RP 1478.

bank officer testified concerning her understanding of the impact of the UCC on the transaction. RP 672-72, 680.

It was imperative that Mr. Spring be able to present evidence concerning the American Marine Bank loan to the jury, and to be able to distinguish for the jury between a signature loan and a secured loan. RP 1515-19. Expert testimony on commercial law and the UCC was crucial to the jury's understanding the evidence in this complex case. Reese v. Stroh, 128 Wn.2d at 306; ER 702.

The trial court allowed a brief offer of proof as to Mr. Smith's qualifications concerning the UCC and commercial law, RP 1479-90; however, the court ultimately ruled that although Mr. Smith had an understanding of the UCC, the court did not find Mr. Smith's testimony relevant to the issues between the parties at odds in the case. RP 1491. The court ruled that the offer of proof had only done "more to enforce my prior view rather than to change it." RP 1491.

Mr. Spring's defense was critically restricted when the trial court denied the motion to permit David Smith to be qualified as an expert witness. The expert testimony of this witness was highly relevant to Mr. Spring's defense – particularly to his explanation concerning the transaction involving the American Marine Bank.

Mr. Smith's testimony concerning the application of the UCC to the transaction would have exculpated Mr. Spring, and would certainly have assisted the jury in understanding the complex financial evidence presented at trial. Mr. Spring had the constitutional right to present this evidence so that the jury had the information needed to determine whether or not the State had met its burden to prove theft in the first degree on this particular count. The trial court's ruling thus violated his due process right to present a defense. Maupin, 128 Wn.2d at 924.¹¹

c. The trial court's refusal to permit Mr. Spring to call an expert witness violated his right to present a defense. Due process demands that a defendant be permitted to present evidence that is relevant and of consequence to his or her theory of the case. Maupin, 128 Wn.2d at 924; State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); see also Am.Jur.2d , §§ 4, 49, 52. A violation of the right to compel witnesses is presumed prejudicial. Maupin, 128 Wn.2d at 924; State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). It is the prosecution's burden to show that the

¹¹ In addition, David Smith was cross-examined at length concerning the American Marine Bank loan. RP 1515-19, 1524-25. However, with only the ability to respond as a transactional witness – and not as an expert on the UCC – the defense was hobbled.

error was harmless beyond a reasonable doubt. Maupin, 128 Wn.2d at 924; Burri, 87 Wn.2d at 175.

d. Since precluding Mr. Spring's opportunity to call a defense witness was an error that cannot be viewed as harmless, reversal must be granted. Without this expert witness, no witness could assist the jury in understanding the complex area of the UCC. Clearly, as the jury's note indicated, the jury was confused, at the very least, about good faith buyer transactions, and the testimony of an expert witness would have been helpful to "assist the trier of fact to understand the evidence." ER 702; Reese v. Stroh, 128 Wn.2d at 306.¹² The error went to the heart of Mr. Spring's defense, particularly on the transaction with American Marine Bank, and the State cannot demonstrate that the error was harmless beyond a reasonable doubt.

In the alternative, appellate courts normally review evidentiary rulings under the abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); see Stevens v. Gordon, 118 Wn. App. 43, 51, 74 P.3d 653 (2003) (admission or exclusion of expert testimony is discretionary). Should this Court

¹² Although the jury acquitted on the good faith buyer counts, it is presumed that the jury's confusion concerning the UCC permeated their deliberations. CP 124-25.

determine the error is not a constitutional one, it must determine if the trial court abused its discretion in excluding the expert testimony of David Smith. An abuse of discretion occurs when the court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id.; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The deprivation of Mr. Spring's right to present a critical aspect of his defense in a meaningful fashion was not harmless, and requires reversal. Maupin, 128 Wn.2d at 929-30; Rice, 48 Wn. App. at 12 ("Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case").

Due to this violation of Mr. Spring's due process rights, his conviction must be reversed and remanded for a new trial.

4. THE TRIAL COURT VIOLATED MR. SPRING'S EQUAL PROTECTION RIGHTS, CHARGING HIM WITH THE MORE GENERAL FELONY OF FORGERY, RATHER THAN THE SPECIFIC MISDEMEANOR GOVERNING CAR DEALERS.

Statutes are concurrent for purposes of Equal Protection if all the elements to convict under the general statute – here, the forgery statute – are also elements that must be proved for

conviction under the more specific statute. State v. Chase, 134 Wn. App. 792, 800, 142 P.3d 630 (2006); State v. Presba, 131 Wn. App. 47, 52, 126 P.3d 1280 (2005); See U.S. Const. amend. 14.

a. Where a defendant's conduct is proscribed by a general and a specific statute, the State may charge only the specific statute. When a specific statute proscribes conduct that is also proscribed by a more general statute, the "general-specific" rule of statutory construction requires the State to prosecute only under the more specific statute. State v. Conte, 159 Wn.2d 797, 803-04, 154 P.3d 194, cert. denied, 552 U.S. 992 (2007); State v. Shriner, 101 Wn.2d 576, 590, 681 P.2d 237 (1984). The rule is designed to promote equal protection of the laws by subjecting people committing the same misconduct to the same potential punishment. State v. Cann, 92 Wn.2d 193, 196, 595 P.2d 912 (1979); State v. Chase; 134 Wn. App. at 800; U.S. Const. amend. 14. If a prosecutor may elect which statute to charge based on unfettered whim or dislike for the particular offender, the State improperly controls the degree of punishment it wishes to impose on differently situated persons, for identical criminal conduct. Cann, 92 Wn.2d at 196; Chase; 134 Wn. App. at 800.

In State v. Danforth, the Supreme Court utilized this principle to vacate a conviction for second degree escape because the defendant's conduct was more properly prosecuted as a failure to return to work release. 97 Wn.2d 255, 258, 643 P.2d 882 (1982). The Court pointed out that the failure to return to work release statute recognized a valid legislative distinction between the purposeful act of "going over a prison wall" and the situation where a person fails to return to work release when expected. Danforth, 97 Wn.2d at 258.

b. RCW 46.70.180(12)(b) and forgery are concurrent statutes. RCW Chapter 46.70, titled Dealers and Manufacturers, contains numerous laws and regulations governing new and used motor vehicle sales. RCW 46.70.005-RCW 46.70.920. In the section's declaration of purpose, it is noted that the legislature has declared that vehicle sales vitally affect the State's economy and that in order to promote the public interest, the State may regulate and license car dealers. RCW 46.70.005. The statute also notes that it is a misdemeanor to violate any of the individual provisions of this chapter, except where expressly provided otherwise. RCW 46.70.170.

Here, Mr. Spring was convicted of four counts of forgery. But the more specific crime enumerated in RCW 46.70.180(12)(b) (Unlawful acts and practices) criminalizes the actual “signing [of] any ... odometer statements, or title documents, or having the name of the buyer’s agent appear on the vehicle purchase order, sales contract, or title.” RCW 46.70.180(12)(b).

Clearly, this is the specific act with which Mr. Spring was charged, in terms of his actions with Mr. Horne and Mr. McKim (counts 14 through 17). However, Mr. Spring was convicted of the more general crime of forgery. Since it is not possible for a person to violate the specific statute without violating the general statute, the statutes are concurrent. Shriner, 101 Wn.2d at 590; Chase, 134 Wn. App. at 800.

The Supreme Court considered a similar situation in Shriner, where a defendant was convicted of theft in the first degree, but argued that he should have been charged under the specific statute governing criminal possession of a rental car. 101 Wn.2d at 578-79. The Shriner Court agreed, holding, “it is a well established rule of statutory construction that ‘where 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.” Id. at 580 (quoting Cann, 92 Wn.2d at 197). The Court held that Shriner was improperly charged and convicted and reversed his conviction. Shriner, 101 Wn.2d at 583. The Court also stated that “the creation of a specific statute shows a legislative intent that persons who perform the type of acts to which it is directed ... should be punished under the specific statute or not at all.” Id.

Here, the two statutes are concurrent. Statutes are concurrent if each violation of the specific statute must result in a violation of the general statute. See, e.g., Chase, 134 Wn. App. at 800. It is RCW 46.70.180(12)(b), the specific statute, that refers to the improper signing of odometer statements and title documents, which is the conduct ascribed to Mr. Spring. CP 45-54. Since the general forgery statute would be violated each time there was a violation of the specific statute, the statutes are concurrent. Shriner, 101 Wn.2d at 580; Chase, 134 Wn. App. at 800.¹³

c. The forgery convictions must be reversed. Under the rule of Shriner, the remedy for the prosecution of concurrent

¹³ The instant case is distinguishable from State v. Heffner, 126 Wn. App. 803, 808-09, 110 P.3d 219 (2005). In Heffner, this Court found the two statutes not to be concurrent, based upon the \$1,500 threshold required by the first degree theft statute. Id. at 808-09. Here, the forgery statute poses no such requirement.

offenses is that the general convictions be vacated. Shriner, 101 Wn.2d at 580. “[S]ound principles of statutory interpretation and respect for legislative enactments require that the specific statute prevails to the exclusion of the general.” Id. at 583. Thus, when concurrent statutes cover a defendant’s conduct, the State must charge the defendant only under the more specific statute. Danforth, 97 Wn.2d at 257-58.

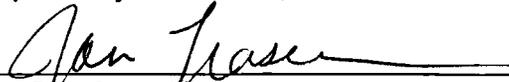
The remedy for the improper prosecution of concurrent offenses requires that the forgery convictions (counts 14-17) be vacated. Shriner, 101 Wn.2d at 580; Danforth, 97 Wn.2d at 257-58.

E. CONCLUSION

For the foregoing reasons, Tyson Spring respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 20th day of January, 2011.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65465-9-I
v.)	
)	
TYSON SPRING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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:

<p>[X] JOHN CARVER, DPA SUZANNE LOVE, DPA KING COUNTY PROSECUTING ATTORNEY ECONOMIC CRIMES UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] TYSON SPRING 509 ACADEMY DRIVE AUSTIN, TX 78704</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JANUARY, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710