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COURT OF APPEALS

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No. 347²7-0-II

SEATTLE, WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ERIC WILLIAMS DOWNING,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY,
JUVENILE DIVISION

The Honorable James Orlando, and
The Honorable Thomas Larkin, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove an essential element of the offense.

2. Appellant assigns error to the juvenile court's oral finding that he presented a check to the bank "with the intent to defraud and knowing that the check . . . was in fact forged." RP 94.

3. Appellant assigns error to the juvenile court's oral finding that he had a check and "pass[ed] it off to the bank as [his]. . . own paycheck." RP 94.

4. Appellant assigns error to the juvenile court's finding, in finding VI, that "[w]hen asked by Canzler, DOWNING gave a false reason as to why the check was completed with different inks." CP 5.

5. Appellant assigns error to JuCR 7.11(d) "conclusion of law" II, which provided:

That ERIC WILLIAMS DOWNING is guilty beyond a reasonable doubt of the crime of FORGERY in that, on 01/24/05, in Washington[sp], he possessed, offered or put off as true a written instrument, check number 6621 drawn on the account of Jim Robinson Enterprises, LLC, with the intent to defraud or injure and knowing the check was forged.

CP 6.

6. The juvenile court erred in finding appellant guilty of an uncharged offense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove forgery as charged, the prosecution was required to show both that appellant acted with knowledge that the check he presented to the bank was forged, and that he acted with intent to defraud

or injure.

Appellant, a youth with learning disabilities, was asked by an older neighbor boy to cash his “paycheck“ for him at the bank. The “paycheck” was a signed check with an amount written in but no “payee.” The boys had appellant’s sister fill out appellant’s name so he could cash it, because the sister had the best handwriting. Appellant consulted his mother who gave her approval to appellant going to the bank in order to see if it was possible for him to help his neighbor.

Did the court err in finding appellant had the required “intent to defraud or injure” the bank in presenting the check and the required knowledge that the check was forged when 1) there was no evidence appellant knew that the check was not valid or that the bank would be harmed by cashing it, 2) the bank teller testified that appellant told her up front that the check was not his but rather was his neighbor’s paycheck which appellant was cashing for him, 3) appellant presented his own valid, current identification, including correct contact information and a phone number, in presenting and trying to cash the check, 4) when questions arose about the check appellant left the bank and returned right away with the neighbor in question, rather than simply leaving and never coming back as the teller said people trying to cash bad checks do and 5) appellant was not involved in or aware of the theft of the check by the neighbor boy, nor was he involved in or aware of the original writing of the check?

2. Appellant was only charged with committing forgery under RCW 9A.60.020(1)(b), by possessing or putting off as true a written instrument knowing that it was forged. At the fact-finding, the judge

found guilty based not only on that allegation but also on the uncharged means of falsely making, completing or altering a written instrument, defined as forgery on RCW 9A.60.020(1)(a). Is reversal required where it is unclear whether the court improperly found guilty on an uncharged means?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Eric Downing, a juvenile, was charged with forgery. CP 1; RCW 9A.60.020(1)(b). After continuances were granted by the Honorable Thomas Larkin on September 14, 2005, and the Honorable James Orlando on February 1, 2006, a fact-finding hearing was held before Judge Orlando on February 21, 2006, and the judge found Eric guilty as charged. 1RP 1, 2RP 1, RP 1.¹

On March 21, 2006, Judge Orlando ordered Eric to serve a standard-range disposition. DRP 1-10; CP 9-15. Eric appealed, and this pleading follows. See CP 22.

2. Relevant facts

Eric Downing has learning disabilities and is in special education classes at school. RP 67-68. He was 17 when his older neighbor, Randy Donahue, told Eric to cash a check for him. RP 14, 63, 72. Randy claimed not to have any identification or the “right” kind of identification

¹The four volumes of the verbatim report of proceedings will be referred to as follows:
Continuance of September 14, 2005, as “1RP;”
Continuance of February 1, 2006, as “2RP;”
Fact-finding of February 21, 2006, as “RP;”
Disposition hearing of March 21, 2006, as “DRP.”

to cash the check himself. RP 14, 63, 72.

Eric went to his mom and asked her about Randy's request. RP 63. He wanted her opinion on whether he should agree, and also her permission to do so. RP 63. Eric's mom testified at the fact-finding hearing that she felt sorry for Randy, because she had seen Randy's mom yelling at him in front of their house and thought Randy's mom was not very nice and would just take Randy's money from him. RP 64. Eric's mom initially offered to put the money in her bank account for Randy, but Eric wanted to try to help Randy and Eric's mom thought it would be a good learning experience for Eric to go do some banking. RP 64-65. Eric did not have a bank account of any kind at the time and knew nothing about it or about checks. RP 62-63.

Because she thought it would help Eric learn "critical thinking skills" and "life skills" to go into a bank and find out about "the process of banking," she told Eric to help Randy. RP 65. She testified that she thought Eric needed to "grow up and learn how to do certain things on his own," and that it would be good to have Eric ask the teller "if it was acceptable" to do what Randy had asked, instead of Eric having "Mommy doing it for him." RP 65-66. She thought about the possibility that "any check that anybody has could be bad" but quickly decided that it was not likely that a neighbor who lived right next door would get them involved in such a thing. RP 69-70. It was decided that Eric would "[g]o to the bank and ask them, '[i]s this a good check? Here is my neighbor, he's standing next to me. Check it out. Is this acceptable? Can [I]. . . use his I.D. to facilitate this and help him?'" RP 69.

The check was not made out to Randy and the boys had Eric's sister write Eric's name on the check, because she had good handwriting. RP 84-87. When Eric talked with his mom, he told her that Eric's sister had put Eric's name on the check. RP 87. Eric's mom did not recall that and did not look at the check because she figured the bankers were the "experts" who would have to determine whether to cash the check under the circumstances. RP 69-70.

Eric then went to the bank with Randy and cashed the check, using Eric's passport and his current identification to do so. RP 72-74.

A few days later, on January 24, 2005, Randy asked Eric to do it again, and they went to the bank again after Eric's sister again wrote Eric's name on the check. RP 74-76, 86. This time the teller was Trisha Canzler. RP 35. Eric showed Ms. Canzler his passport and high school ID and she wrote the information on the check, took his thumbprint, and looked at a third piece of ID he gave her. RP 35-37, 42. His telephone number was written on the back of the check and Ms. Canzler verified that it was "a good number." RP 41-43.

Nevertheless, Ms. Canzler noticed that the "pay to the order of" section of the check was made out in different ink and with different writing than the rest of the check. RP 37-38. She asked about it and testified that she thought Eric stated that the girlfriend of the guy whose check it was had written it in. RP 39-40. She qualified her testimony on this point by saying, "if I remember correctly." RP 39-40.

Ms. Canzler testified that Eric told her the check was not from his employer but instead someone else's, that the check was given to him to

cash for the other person, that the other person “that was employed by these guys” did not have proper identification to cash the check himself. RP 40, 44. Throughout the transaction, Eric repeatedly indicated that the check was not his and he was cashing the check for a friend. RP 45.

Ms. Canzler decided she would need a manager’s approval on the check. RP 40. Either at her behest or on his own initiative, Eric left the bank to get the person to whom Eric said the check had been written, Randy. RP 40-41. He came back inside with Randy a few moments later, and Ms. Canzler’s manager handled everything from then on. RP 41. Ultimately, the check was not honored. RP 40-41.

Ms. Canzler stated that, with all the information Eric had given her in order to cash the check, there were “multiple ways” the bank could have identified him and contacted him if there were any problems with the check. RP 44. She also said that, in previous situations involving “bum” checks, people who try to do so always leave and never come back into the bank, unlike Eric, who came back in with Randy when there were issues with the check. RP 45.

Jim Robinson, the owner of the company whose checks were involved testified that, about a week before the incidents at the bank, Randy Donahue and another young man named Justin Verhof had been at the Robinson house. RP 14-15. Randy was the friend or boyfriend of Katie Robinson, Mr. Robinson’s daughter. RP 16-17. Mr. Robinson got a phone call from the bank, asking if he had written any checks to Randy. RP 15. He said he had not, and he also looked in his company checkbook and discovered that six checks were missing from the back. RP 17-20.

Justin Verhof did not know Eric and met him for the first time when Randy asked for a ride to the bank. RP 28-29. Randy told Justin that Eric owed Randy some money, had been working and had just gotten a paycheck to pay Randy back, so they needed to go to a bank to get cash. RP 30. When they got to the bank the first time, Eric went in and came out with some money, which he gave to Randy. RP 30. Justin then took them back to their respective houses. RP 30.

A few days later, Randy again asked for another ride for the same reason, but this time when Eric went into the bank he came back out and said that the bank was refusing to cash the check because they wanted to “speak with the account holder.” RP 30. Randy went inside to see if he could “do anything about cashing it or making a difference about it,” and both Randy and Eric came out a few minutes later, seeming stressed out. RP 30.

While they were in the car, Justin’s phone rang, and it was Katie Robinson. RP 28. She was upset and said she had learned that Randy had stolen her dad’s checks and was in the bank trying to cash one “or something.” RP 28. Justin questioned Randy about what was going on, but Randy was evasive, seemed embarrassed, and would not talk, except to say “I’m sorry. I messed up.” RP 28-30. Randy also said something about making things good with Katie’s dad. RP 32. Justin did not remember Randy saying anything to Eric. RP 32.

At the fact-finding hearing held after Eric was charged with a crime for attempting to cash the second check for Randy, Eric testified that spoke with his mom when Randy asked about having him cash the check,

and then agreed to go to the bank the next day to do so. RP 72. After Justin drove Randy and Eric to the bank, Eric went inside and approached the teller, explaining that the check was from his neighbor and it was a "work check." RP 73. He also asked the teller to "make sure it's legal." RP 73. He gave the teller his school I.D., his passport, a thumbprint, and personal information like where he lived and his home phone number, and she cashed the check once he had signed the back. RP 73-75. He then gave the money to Randy and they took him home. RP 75.

A few days later, the same thing occurred, and Eric again gave the teller all of his identification and information and told her that it was not his check, but this time there seemed to be a problem. RP 76-77. Eric did not really understand what the problem was or what she was talking about, so he got Randy to go into the bank. RP 77. Randy then talked to the teller about whatever the problem was, and Eric was wondering what was going on but did not really participate in the discussion and they ultimately left. RP 77-78. It was Eric's understanding that the issue was "going to be taken up with the writer of the check." RP 78.

When they were in the car and Katie called Justin, the call was on "the speaker" in the car and Eric heard what was said about Randy having stolen checks from Katie's dad. RP 78-79. That was when Eric learned that Randy had possibly stolen the checks and the check Eric had just tried to cash was likely bad. RP 80-81. When Eric got home, he called police or they called him and he gave them a statement about what had happened. RP 81-84.

Eric had no prior experience with banking, did not have a bank or

court in Washington is entitled to these protections. In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); see State v. DeVries, 149 Wn.2d 842, 849, 854, 72 P.3d 748 (2003); State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Where a juvenile is adjudicated guilty of an offense without proof beyond a reasonable doubt, reversal is required and retrial is barred. DeVries, 149 Wn.2d at 854; State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982); Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981).

In this case, this Court should reverse and dismiss the adjudication of guilt, because there was insufficient evidence to prove two of the essential elements of the crime.

Eric was charged with committing forgery under RCW 9A.60.020(1)(b), which provides:

- (1) A person is guilty of forgery if, with intent to injure or defraud;
...
- (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

Thus, an essential element of the crime is that the defendant engage in the requisite uttering or other acts “with intent to injure or defraud.” State v. Scoby, 117 Wn. 2d 55, 59, 62, 810 P.2d 1358, 815 P.2d 1362 (1991).

Further, the prosecution must prove the essential element that the defendant had the required knowledge that the written instrument was “forged” at the time he engaged in the prohibited uttering or other act. 117 Wn.2d at 62.

The prosecution failed to meet its burden of proof for both of those essential elements. In juvenile cases, under JuCR 7.11(d), a juvenile court

is required to enter written findings and conclusions in which the court must “state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision.” A “finding of fact” is a statement that something occurred or existed, while a conclusion of law is a statement of the legal significance of a fact. State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986).

Here, the court made no written finding that Eric had intent to injure or defraud. CP 4-6. Nor did the court enter a finding that Eric knew the instrument was forged. CP 4-6. Instead, the court simply stated, in conclusion II, that Eric had “the intent to defraud or injure” and engaged in the prohibited acts “knowing the check was forged.” CP 6.

Thus, the court erroneously designated these crucial findings that Eric had the required intent and knowledge as conclusions of law. Findings erroneously included in conclusions are nevertheless reviewed under the standard for findings on appeal. State v. CLR, 40 Wn. App. 839, 843, 700 P.2d 1195 (1985). To meet that standard, a finding must be supported by substantial evidence in the record, to withstand review. State v. Echeverria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997). Substantial evidence is evidence of a sufficient quantity for a rational, fair-minded trier of fact to find the truth of the declared premise. Id.

Similarly, evidence is sufficient to support a conviction only if, taken in the light most favorable to the prosecution, a rational trier of fact could have found each of the essential elements of the crime, beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed.

2d 560 (1970). Where a defendant argues that the evidence was insufficient, that claim admit the “truth” of the prosecution’s evidence and all reasonable inferences from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, there was insufficient evidence that Eric had the required intent to defraud or injure, or that he had the required knowledge, to support either the court’s findings or the adjudication of guilt. First, to prove intent to injure or defraud under the forgery statute, the prosecution must show an intent to deceive and cause harm. State v. Simmons, 113 Wn. App. 29, 33, 51 P.3d 828 (2002). Thus, to prove Eric guilty of forgery for presenting the check to the bank, the prosecution was required to prove that he did so with intent to deceive the bank and cause harm.

The record is completely devoid of any evidence to support that element, or the court’s finding. In finding guilty, the judge declared to Eric, “when you pass it off to the bank as your own paycheck,” that meant the prosecution had met its burden of proof. RP 94. But that oral finding was simply incorrect. The bank teller specifically testified that Eric told her someone else wrote his name on the check, that it was not his check, and that it was someone else’s paycheck and that he was only trying to help them in cashing it for them. RP 37-38. There was *no* testimony that Eric ever indicated the check was his paycheck or that he attempted to deceive the bank teller in that way. Instead, Eric was honest about what he was trying to do and whose check he thought it was, and that someone else had written his name on the check. There was not only not substantial evidence that Eric tried to pass of the check as his own paycheck, there

was *no* evidence of such an effort.

The court may also have relied on its oral finding that Eric “gave a false reason as to why the check was completed with different inks” when he was asked by Ms. Canzler at the bank. CP 5. It is true that Ms. Canzler testified that she thought that, when asked about it, Eric said something about his friend’s girlfriend having written Eric’s name in. RP 39-40. Based upon the testimony at the fact-finding, that was “false,” because it appears it was Eric’s sister who had written Eric’s name in.

But this “falsity” does not provide sufficient evidence to convince a rational, fair-minded trier of fact that Eric was intending to defraud the bank, given all the other facts. Again, Eric never tried to hide who he was - he provided multiple forms of *accurate* identification with current contact information on them. He never tried to hide that the check was not his and that he was cashing it for someone else. Instead, he *told* the teller these facts. Even the teller’s testimony about whether Eric gave the right information about who had filled out his name indicated she was somewhat unsure that he had said just that. RP 39-40.

Further, any “falsity” here was largely immaterial. It did not matter, for the bank’s purposes, whether the person who filled out Eric’s name was his sister or his friend’s girlfriend. Either way, the person who filled it out was clearly not the check’s maker. And either way, Eric’s statement to the teller made that fact clear.

There was insufficient evidence to support the finding that Eric presented the check to the bank with intent to deceive the bank and cause harm, an essential element of the offense.

In addition, there was insufficient evidence to support a finding that Eric presented the check with the required knowledge. Under the statute, the defendant must have possessed, uttered, offered, disposed of, or “put[] off as true” a written instrument “which he *knows* to be forged.” RCW 9A.60.020(1)(b) (emphasis added). An instrument is only forged if it has been “falsely made, completed, or altered.” RCW 9A.60.010(7). RCW 9A.60.010 defines “falsely make,” “falsely complete,” and “falsely alter,” as follows:

(4) To “falsely make” a written instrument means to make or draw a complete or incomplete written instrument which purports to be authentic, but which is not authentic either because the ostensible maker is fictitious or because, if real, he did not authorize the making or drawing thereof;

(5) To “falsely complete” a written instrument means to transform an incomplete written instrument into a complete one by adding or inserting matter, without the authority of anyone entitled to grant it;

(6) To “falsely alter” a written instrument means to change, without authorization by anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner[.]

RCW 9A.60.010. Thus, to prove the essential “knowledge” element of the crime, the prosecution was required to prove 1) that Eric knew that the check was not authentic because its maker was fictitious or, if real, did not authorize its making or drawing, or 2) that Eric knew that someone had made the check “complete” by adding something that person had not been given authority to do, or 3) that Eric knew that someone had altered the check in some way without authorization to do so.

There was insufficient evidence to prove such knowledge here.

It is true that forgery can be committed by falsely “making,” completing or altering a written instrument under RCW 9A.60.020(1)(a). But Eric was not *charged* under RCW 9A.60.020(1)(a). He was specifically charged not with the “making” means of committing the offense but with the separate crime defined in RCW 9A.60.020(1)(b) of knowingly “uttering” or putting off as true “a written instrument” with intent to injure or defraud. CP 1; see, e.g., State v. Hescoek, 98 Wn. App. 600, 989 P.2d 1251 (1991) (the two means are different).

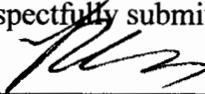
Both the Sixth Amendment and Article I, § 22 of the Washington constitution guarantee the right of a defendant not only to notice of the charges against him but also “to be tried only for offenses charged.” State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997); State v. DeRosa, 124 Wn. App. 138, 150, 100 P.3d 331 (2004). The only exceptions are for conviction of an offense which is a “lesser included” or “lesser degree” of the crime charged. See RCW 10.61.006; State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). The court erred in making this finding and to the extent it relied on this in entering the conclusion of guilt, because it amounted to adjudication of guilt for an uncharged crime.

E. CONCLUSION

There was insufficient evidence to prove not one but two essential elements of the crime. In addition, the court erroneously found guilt based upon an uncharged offense. This Court should reverse.

DATED this 25th day of October, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage prepaid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
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DATED this 29th day of October, 2006.


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