ORIGINAL

No. 35111-1-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICIA D. GLASER-GIBSON,

Appellant.

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 05-1-00475-4

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant assigns error to the Mason County Superior Court's entry of the Felony Judgment and Sentence on June 26, 2006.
2. Appellant assigns as error the Court's denial of Appellant's Motion to Arrest Judgment and Grant a New Trial.
3. Appellant assigns as error the entry of the verdicts of guilty.
4. Appellant assigns as error the Court's evidentiary ruling denying admission of the certified copy of the Information in State vs. Nancy L. Barnett, Mason County Cause No. 05-1-00269-7 and the Statement of Defendant of Plea of Guilty to Non-Sex Offense in State vs. Nancy Barnett, Mason County Cause No. 05-1-00269-7.
5. Appellant assigns as error the trial court's ruling denying Appellant's Motion to Strike the Second Amended Information.
6. Appellant assigns as error the refusal of the trial court to give Appellant's proposed Instruction No. 17.
7. Appellant assigns as error the Court's failure to give Appellant's proposed Instruction No. 18.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court properly excluded Exhibits 11 and 12 on relevance grounds given that Appellant's was afforded an opportunity to cross-examine Witness Nancy Barnett with respect to her plea of guilty to a forgery of the Last Will and Testament of David S. Barnett, attached as Appellant's Appendix 3? (Assignment of Error Nos. 1 through 4).
2. Whether the statutes and information under which Appellant was charged with the crimes of forgery are clear and unambiguous? (Assignments of Error 5-7).

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Pursuant to RAP 10.3(b), the State accepts Glaser-Gibson's recitation of procedural facts set forth in her opening brief.

2. SUBSTANTIVE FACTS

This case involves the forgery of a document purported to be the Last Will and Testament of David Barnett (EX 1).

David Barnett died on January 21, 2005. (RP 8). At the time of his death, David Barnett resided in a trailer upon a tract of land referred to as the family home. (RP 10). The property is situated in Mason County, Washington. (RP 4). At the time of David Barnett's death, he had not executed a Last Will and Testament (RP 8, RP 38, RP 163.)

On February 15, 2005, a document purporting to be the Last Will and Testament of David Barnett was filed with the Mason County Clerk's Office. (RP 14). Philip A. Barnett, the twin brother of David Barnett, received a faxed copy of the purported will a few days after it was filed with the Mason County Clerk's Office. (RP 14). Upon reviewing the first page of the document, Philip Barnett immediately knew that the signature was not that of his brother David Barnett. (RP 15.) The signature was not, in fact, ". . . even a close facsimile to his signature," according to Philip Barnett. (RP 15). His opinion did not change

after reviewing the purported will in its entirety. (RP 15). The purported will had been notarized by the Appellant, Patricia Glaser-Gibson, and had allegedly been witnessed by April Mae Bunting and Steve Stryker on January 10, 2005. (EX 1).

Philip Barnett obtained a copy of the purported will from the Mason County Clerk's Office and reported the incident to the Shelton Police Department. (RP 16).

Detective Harry Heldreth of the Shelton Police Department investigated the forging of David Barnett's Last Will and Testament. (RP 91). During the course of the investigation, Detective Heldreth contacted the Appellant because she appeared to be the notary public who had notarized the signatures on the purported Last Will and Testament of David Barnett. (RP 95) Appellant verified that it was a true and correct document and that she had notarized the signatures on the date that was indicated. (RP 95). Detective Heldreth later determined that David Barnett's sister, Nancy Barnett, had forged the document that was purported to be the Last Will and Testament of David Barnett. (RP 174). Appellant was identified as a participant in the forgery after Nancy Barnett told detectives that Appellant did her (Nancy Barnett) a favor by signing David Barnett's name to the forged Last Will and

Testament, as well as falsely notarizing her own forged signature on that same document sometime during the first or second week of February, 2005, after David Barnett's death. (RP 145-146, RP 174-175).

April Mae Bunting and Steve Stryker signed the forged Last Will and Testament of David Barnett sometime in February, 2005 (RP 70). Nancy Barnett was present when Ms. Bunting and Mr. Stryker signed the forged will (RP 81), however Appellant was not. (RP 68, RP 84, RP 147).

Nancy Barnett was charged with and ultimately pled guilty to one count of forgery as a result of Detective Heldreth's investigation into the forgery of David Barnett's Last Will and Testament (RP 145). Nancy Barnett was a State's witness at Appellant's trial and, among other things, testified that she pled guilty to a forgery of her brother's Last Will and Testament (RP 145). Appellant sought to introduce a certified copy of the information charging Nancy Barnett with forgery, as well as a certified copy of her Statement of Defendant on Plea of Guilty (RP 150). The Court sustained the Respondent's objection to admission of the documents on relevance grounds, finding that Appellant was free to inquire on cross-examination regarding the

plea, but that the documents would not be admitted as evidence (RP150-151). Appellant did not purse any cross-examination of Ms. Barnett on the issue of her plea. (RP 152).

D. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED EXHIBITS 11 AND 12 ON RELEVANCE GROUNDS GIVEN THAT APPELLANT WAS AFFORDED AN OPPORTUNITY TO CROSS-EXAMINE WITNESS NANCY BARNETT WITH RESPECT TO HER PLEA OF GUILTY TO A FORGERY OF THE LAST WILL AND TESTAMENT OF DAVID S. BARNETT

Impeachment evidence is subject to the same rules of admissibility as other evidence. Simply put, evidence must be relevant to be admissible. ER 402. Relevant evidence is defined as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

A criminal defendant is not deprived of his or her constitutional right[1] to confront witnesses when irrelevant impeachment evidence is excluded. "The Sixth Amendment does not entitle a defendant to present irrelevant evidence." *State v. Jones,* 117 Wash.App. 221, 233, 70 P.3d 171 (2003), citing *State v. Hudlow,* 99 Wash.2d at 15, 659 P.2d 514

(1983). The test for determining whether the trial court has erred in excluding impeachment evidence against a State's witness is two pronged: "First, the evidence must be relevant. Second, if the evidence is relevant, the court looks to see whether the State has shown a compelling interest that outweighs the interest of the defendant in admitting the evidence." *State v. Jones,* at 233, citing *State v. Hudlow,* 99 Wash.2d 1,15, 659 P.2d 514 (1983).

In ruling on the admissibility of Exhibits 11 and 12, the trial court ruled that Exhibit 11, a certified copy of the Information charging State's witness Nancy Barnett with one count of forgery, was irrelevant and inadmissible. Contrary to Appellant's assertion that the trial court foreclosed cross-examination on the subject (Appellant's Brief, Page 20), the trial court specifically ruled that Appellant was free to inquire about the plea given Nancy Barnett's testimony that she had pled guilty to the forgery of David Barnett's purported Last Will and Testament (RP 150). In denying admission of Exhibit 12, Nancy Barnett's Statement of Defendant on Plea of Guilty to the forgery, the trial court excluded the exhibit on relevance grounds, and on the grounds that the document would not enlighten the jury and would serve no purpose except to mislead (RP

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[1] Amendment 6 of the United States Constitution; Article 1, Section 22 of the Washington State Constitution.

152). Upon resuming cross-examination of Nancy Barnett, the Appellant made no further inquiry as to the plea, even though the trial court had clearly given Appellant leave to do so. (RP 152-154)[2]

Appellate courts review a trial court's rulings on the admissibility of evidence under an abuse of discretion standard. State vs. Stenson. 132 Wash.2d 668,701, 940 P.2d 1239 (1997), citing ., State v. Pirtle, 127 Wash.2d 628, 648, 904 P.2d 245 (1995), *cert. denied,* 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996); State v. Powell, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists when a trial court's exercise of discretion is manifestly unreasonable or is based upon untenable grounds or reasons. Id.

The trial court did not abuse its discretion in excluding excluded Exhibits 11 and 12 on relevance grounds. Given that Appellant's proffered impeachment evidence was ruled to be irrelevant, Appellant cannot show that the trial court violated her right to confront witnesses under the two-prong test set forth in *State v. Hudlow,* 99 Wash.2d 1,15, 659 P.2d 514 (1983).

2. THE STATUTES AND INFORMATION UNDER WHICH APPELLANT WAS CHARGED WITH THE CRIMES OF FORGERY ARE CLEAR AND UNAMBIGUOUS

[2] It is worthy of note that Appellant's appeal counsel was also Appellant's trial counsel. Any claimed error regarding the failure of trial counsel to pursue this area of cross-examination would be invited error.

A person commits the crime of forgery if he or she, with intent to injure or defraud: either (a) falsely makes, completes, or alters a written instrument; or (b) possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged. RCW 9A.60.020. The statute sets forth alternative ways in which the crime of forgery may be committed. Similarly, a person may be charged with the crime of forgery either as a principal, as an accomplice, RCW 9A.08.020(3), or in the alternative as either a principal or an accomplice.

Appellant objects to use of the phrase "and/or" in the Second Amended Information, in which the State alleged in the alternative that Appellant was either a principal or an accomplice to the forgeries.

Courts have consistently permitted the State to allege crimes, including the degree(s) of culpability and complicity, in the alternative. "Where, by statute, several acts can constitute a single crime, it is permissible and proper to charge one crime in one count and the commission of the crime by alternative acts." *State v. Scott,* 64 Wash.2d, 993, 395 Pl2d 377 (1964), citing *State v. Morse,* 38 Wash.2d 927, 234 P.2d 478 (1951).

As to Appellant's claim regarding the term "put off", Miriam Webster's Dictionary defines the term as: **1a**: disconcert **b**: repel; **2a**: to hold back to a later time **b** to induce to wait; **3**: to rid oneself of; **4** to sell

or pass off fraudulently. (emphasis added). Additionally, at least one federal case has addressed the phrase "put off" as follows,

> 'Passing off, or attempting to pass off, upon the public the goods or business of one man as being the goods or business of another' (28 Am. & Eng. Ency. of L. (2d Ed.) 409, citing *C.F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S.W. 165) and "to palm off" means to impose by fraud; to put off by unfair means * * *' (Words and Phrases Judicially Defined, vol. 6, page 5159, citing *Hobart v. Young*, 63 Vt. 363, 21 Atl 612, 12 L.R.A. 693. (emphasis added)

Sayre v. McGill Ticket Punch Co., 200 F. 771, D.C.Ill. (1912.)

E. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the convictions and sentence as imposed.

DATED February 6, 2007, at Shelton, Washington.

Respectfully submitted,

Rebecca Jones Garcia

Rebecca Jones Garcia, WSBA 27730
Deputy Prosecuting Attorney
Attorney for Respondent

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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

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

STATE OF WASHINGTON,	)	
	)	No. 35111-1-II
Respondent,	)	
	)	DECLARATION OF
vs.	)	FILING/MAILING
	)	PROOF OF SERVICE
PATRICIA D. GLASER-GIBSON,	)	
	)	
Appellant,	)	
	)	

I, TRICIA KEALY, declare and state as follows:

On February 6, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Don W. Taylor
Fristoe, Taylor & Schultz, Ltd., P.S.
Suite 1, Professional Arts Building
206 11th Avenue SE
Olympia, WA 98501

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 6th day of February, 2007, at Shelton, Washington.

Tricia Kealy

Tricia Kealy

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