

**NO. 41083-4**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN LEE BEDILION, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 07-1-00977-1,  
08-1-01290-7, and 09-1-02296-0

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the evidence presented by the State at trial sufficient to allow the jury to convict defendant on the three counts of forgery with special aggravators and one count of theft in the second degree?

2. As defendant failed to object to the special verdict jury instruction at trial, is he unable to raise a *Bashaw* claim for the first time on appeal? Furthermore, given the evidence presented at trial regarding the nature of the forgeries, is any potential error harmless?

3. Since defendant knew all of the direct consequences of the charges to which he pleaded guilty and he stipulated to the outcome of the trial in the 2008 case, should the Court refuse his post-hoc request to withdraw his plea of guilty in the 2007 and 2009 cases?

B. STATEMENT OF THE CASE.

1. Procedure

On February 20, 2007, the State charged Brian Bedilion (hereinafter "defendant") under cause number 07-1-00977-1 ("the 2007

case”<sup>1</sup>) with identity theft in the first degree, forgery, unlawful possession of payment instruments, and attempted theft in the first degree. CP 1-3. The State charged defendant on March 12, 2008, under cause number 08-1-01290-7 (“the 2008 case”) with identity theft in the first degree, theft in the first degree, and nine counts of forgery. CP 113-17. Under cause number 09-1-02296-0 (“the 2009 case”), the State charged defendant with a single count of residential burglary. CP 311.

In preparation for a plea bargain in the 2008 case, the State amended charges in the 2008 case on January 9, 2009, dropping all but two counts of forgery and the charge of identity theft. CP 120-21. Defendant pleaded guilty to identity theft, theft, and forgery on January 8, 2009. CP 132-34. However, defendant withdrew his plea of guilty on March 25, 2009. CP 172.

Prior to beginning trial, the State amended the 2008 case, charging defendant with the original charges of identity theft (count I), theft (count II), and nine counts of forgery (counts III-XI). CP 173-79. Trial began on September 14, 2009, before the honorable Judge Brian Tollefson. RP 1.

On September 25, 2009, the jury found defendant guilty of identity theft in the second degree, theft in the second degree, and three counts of forgery. CP 196-207; RP 673-677.

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<sup>1</sup> Consistent with defendant’s opening brief, the three cause numbers will be referred to by their year throughout this brief.

Prior to sentencing in the 2008 case, defendant pleaded guilty to identity theft in the first degree, theft in the first degree, three counts of forgery, and bail jumping as charged in the 2007 case. CP 284-87. Further, defendant pleaded guilty to residential burglary as charged in the 2009 case. The court imposed sentence in all three cases at the same hearing on September 29, 2009. RP 697-725.

Defendant filed an untimely notice of appeal on August 16, 2010. CP 307-08. The Court of Appeals accepted defendant's late appeal.

## 2. Facts

On October 17, 2006, defendant purchased goods at the Puyallup G.I. Joe's using a forged check. RP 72-81. Defendant also purchased goods from Thunderbird Trading Post on October 16 or 19 of 2006 using a forged check. RP 112-14. On October 21, 2006, defendant purchased apparel at the Lakewood Gottschalks using a forged check. RP 9/15/2009 79-80, 83; RP 328-29, 339-40.

Jan McGinnis, a fraud investigator for KeyBank, provided testimony that her bank received a total of nine forged checks with defendant's name from various retail locations, including Marlene's Market and Deli, G. I. Joe's, Thunderbird Trading Post, PetSmart, World Market, and Big 5 Sporting Goods. RP 9/15/2009 12-14, 27-39. The nine forged checks were used at retail outlets in Pierce County, Washington, during the period of October 17, 2006 to October 22, 2006. *Id.*

The checks, numbered in the range of 10522 to 10541, all had an account holder name of "B & B Landscaping, Brian Bedilion" yet drew funds from an account belonging to Painter's West, a company owned by Jostein Tvedt. RP 9/15/2009 12-14, 27-39. Ms. McGinnis stated that the stores in question suffered an aggregated financial loss in the amount of \$1,717.52. RP 9/15/2009 14, 40. Mr. Tvedt testified that he did not authorize any of the checks in question. RP 47-54. He also stated that he did not authorize defendant to utilize his checking account. RP 48-49.

Detective Jeffrey Maziarski investigated the case. He went to retail stores in Puyallup, Lakewood, and Tacoma to interview clerks that he could find who accepted the fraudulent checks. RP 176-93. He testified that Ms. Peterson positively identified defendant from a photomontage. RP 188. He went to G. I. Joe's in both Lakewood and Puyallup as forged checks had been cashed at both branches. RP 176. One clerk from G. I. Joe's named Kelsey Rahm, and Ms. McAvoy, from Gottschalks, did not make a positive identification. RP 178, 186-87. At Marlene's Market and Deli in Tacoma, he could not find an employee who remembered taking a check from defendant. RP 239-40. He could not locate employees from some of the locations, such as World Market or Big 5 Sporting Goods, who remembered accepting the forged check. RP 176-93.

Defendant presented his case after the State rested. His biological mother testified as to his medical status and his legal blindness. RP 404-429; RP 559-562. Defendant also testified in his own defense. RP 454-513. The defense rested at the end of trial. RP 566-67.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ALL COUNTS OF FORGERY, THE CRIME OF SECOND DEGREE THEFT, AND THE SPECIAL AGGRAVATORS FOR EACH COUNT OF FORGERY.

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). When examining claims of insufficiency of evidence, the reviewing court must construe the evidence in light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Given the evidence, the appropriate standard of review is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Joy*, 121 Wn.2d at 338 (citing *State v. Partin*, 88 Wn.2d 899, 906-7, 567 P.2d 1136 (1977)). Further, “claims of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be

drawn from them.” *Joy*, 121 Wn.2d at 338 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). “In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)). Regarding issues of credibility, conflicting testimony, and persuasiveness of evidence, the review court must defer to the trier of facts interpretations. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

- a. The jury had sufficient evidence to infer that defendant committed the acts of forgery within the State of Washington.

The court instructed the jury that to convict defendant of forgery as set forth in count IX, they must find the following elements beyond a reasonable doubt:

- (1) That on or about the 21<sup>st</sup> day of October, 2006, the defendant possessed or offered or put off as true a written instrument which had been falsely made, completed or altered; (2) That the defendant knew that the instrument had been falsely made, completed or altered; (3) That the defendant acted with intent to injure or defraud; and (4) That the acts occurred in the State of Washington.

CP 266. The jury instruction for Count XI contains very similar elements.

CP 268. On appeal, defendant only argues the fourth element of the

offense: that the State did not put forth sufficient evidence for the jury to conclude that the crimes occurred in the State of Washington. Br. App. at 9-10. As defendant does not argue the other three elements, only defendant's argument regarding the fourth element will be addressed here.

Washington's long-arm criminal statute specifies: "A person who commits an act without the state which affects persons or property within the state, which, if committed within the state, would be a crime." RCW 9A.04.030(5). The Court of Appeals addressed the jurisdictional question, finding that "[n]o matter where [the defendant] actually forged the 10 checks, Washington had criminal jurisdiction over these crimes because all the checks were passed in Washington and therefore affected persons and property within Washington." *State v. Brown*, 29 Wn. App. 11, 13, 627 P.2d 132 (1981). Furthermore, the statutory definition of forgery contains language specific to crimes of identity theft. RCW 9A.60.020:

In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

RCW 9A.60.020(2). Considering the criminal jurisdiction statutes, including the special jurisdictional rule for forgery, the State must provide sufficient evidence such that the jury could conclude that either the

forgery occurred in Washington or that the victim of the associated identity theft resided within Washington.

Ms. McGinnis, a Seattle based fraud investigator for Key Bank, testified that her bank discovered a number of fraudulent checks drawing off of the checking account of Painter's West, a Washington business owned by Jostein Tvedt. RP 9/15/2009 7-14; 27-40. Mr. Tvedt confirmed that the account in question was for his business located in University Place, Washington. RP 41-42. Mr. Tvedt testified that he did not write the fraudulent checks. RP 48. As the forged checks used account information stolen from Mr. Tvedt's Washington based business, were processed in the Washington branch of Key Bank, and involved Washington residents, the jury could reasonably conclude that the counts of forgery occurred within the State of Washington.

Even considering where defendant passed the forged checks, the State presented sufficient evidence for the jury to conclude that the crimes occurred in the State of Washington. Ms. McAvoy, a former employee at the Lakewood Gottschalks at which defendant allegedly attempted to pass forged checks, testified that there is a Big 5 Sporting Goods, Pet Smart, and G. I. Joe's near that location. RP 9/15/2009 97-98. Mr. Bart Griffin, a former manager of the Puyallup G. I. Joe's Sporting Goods where defendant allegedly attempted to pass a forged check, testified that there was a Big 5 Sporting Goods across the street from his store. RP 73-74. Both areas where defendant had passed forged checks had a Big 5

Sporting Goods location nearby. Detective Maziarski testified as to the process he went through to find people at the Lakewood, Puyallup, and Tacoma area businesses at which the forged checks had been used. RP 238-41. He went to local stores, including World Market and Big 5 Sporting Goods locations in Pierce County, to find cashiers who accepted the check but could not find the specific cashier. *Id.* A rational inference would be that the forged checks were passed in locations near one another. Thus, a reasonable juror could infer that defendant attempted to use the forged checks at locations within Washington.

Based on the evidence presented by the State, a reasonable juror could rationally infer that all of the locations at which defendant attempted to pass forged checks were within Pierce County, Washington, and the victim of the identity theft was in Pierce County, Washington. Therefore, the jury could properly conclude that the crimes of forgery occurred within the State of Washington.

- b. Given the harm caused to multiple parties from each individual act of forgery, the State presented sufficient evidence for the jury to find that the multiple victim aggravator applied.

RCW 9.94A.535(3)(d) states that a jury may find a defendant guilty of the aggravating factor: “The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors: (i) The current offense involved multiple

victims or multiple incidents per victim[.]” Further, statute defines the word “victim” to mean “any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” RCW 9.94A.030(53). For the State to show that a crime fulfills the requirements of the aggravator, the State must show that multiple persons sustained some sort of injury from the crime or that the same person sustained injury multiple times through the course of the crime.

Ms. McGinnis testified that the stores that accepted the fraudulent checks suffered the financial loss from them. RP 9/15/2009 14. Ms. McGinnis also explained the costly process the bank, another victim, went through to find all of the potential forgeries. RP 9/15/2009 11. Mr. Tvedt, also victimized by defendant’s crime, testified that he had to change his bank account in response to the fraud committed against it. RP 42-42. Mr. Griffin explained that when a store employs a check verification company, as his establishment did, that company takes the loss in lieu of the store. RP 106. For each forged check, there is the primary victim that suffered the financial loss in the value of the check and several secondary victims that suffer injury due to the forgery. Thus, for each count of forgery, the State presented evidence such that a jury could reasonably infer injury to both the stores defrauded, the bank which had to investigate the fraud, and the holder of the account that the false check drew funds from. Considering the evidence in the light most favorable to the State, a

reasonable jury could properly find that the counts of forgery were major economic crimes in accordance with the special verdict instruction.

- c. The State presented sufficient evidence for a reasonable juror to conclude that defendant unlawfully obtained property of others.

The court instructed the jury regarding the lesser included offense of theft in the second degree. The elements required to convict the defendant were:

- (1) That on or about the 14th day of October through the 22nd of October, 2006, the defendant wrongfully obtained or exerted unauthorized control over property of another;
- (2) That the property exceed \$250 in value but did not exceed \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

CP 273. The State must present sufficient evidence such that the jury can conclude that defendant committed the crime of theft in the second degree.

RCW 9A.56.010(21)(c) allows for multiple instances of theft to be aggregated in determining the overall value of theft:

[W]henver any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

RCW 9A.56.010(21)(c). The statute also states that a “criminal episode” means a series of thefts conducted at three or more establishments within a five-day period. RCW 9A.56.010(21)(c).

Ms. Dearfield testified that a customer gave one of the falsified checks to pay for apparel. RP 328-29. She identified defendant as the customer who paid with the check. RP 339-40. Ms. McAvoy also testified that defendant attempted to purchase apparel at the Gottschalks. RP 9/15/2009 79-80. Ms. Peterson testified that defendant purchased goods with the falsified check, although she could not remember details of the transaction. RP 114-15.

Ms. McGinnis testified regarding each of the fraudulent checks utilized by defendant to acquire goods from different stores. RP 9/15/2009 27-39. She also stated that the stores in question suffered the loss. RP 9/15/2009 14. She computed the total financial loss incurred by the different stores and testified as to the value: \$1,717.52. RP 9/15/2009 40. However, on cross-examination, she stated that one of the checks, valued at \$407.23, may not have caused a loss to any party. RP 9/15/2009 40; 58-59. She recomputed the total loss to be \$1,290.29. RP 9/15/2009 41.

Defendant argues that if the State failed to present sufficient evidence for the jury to conclude that he committed two of the three counts of forgery, the court must by operation of law overturn the

conviction for theft. App. Br. at 10-11. Jury instruction #5 stated that “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP 240. The jury considers each count separately. A reasonable juror could conclude that the State presented sufficient evidence to show defendant committed theft while not demonstrating sufficient evidence of forgery. Thus, even if the court reverses defendant’s two convictions of forgery, the theft conviction remains.

Considering the evidence in light most favorable to the State, a reasonable juror could infer that defendant unlawfully obtained goods from the various retail stores at value of the sum of the forged checks. Further, given testimony by Ms. McGinnis, the jury could infer that the value of the unlawfully acquired goods was greater than \$250. Therefore, a reasonable jury could find that defendant committed the crime of theft in the second degree and the conviction should be affirmed.

2. AS DEFENDANT FAILED TO OBJECT TO THE SPECIAL VERDICT INSTRUCTION AT TRIAL, HE CANNOT RAISE IT FOR THE FIRST TIME ON APPEAL.

Jury instructions are proper where, read together, they correctly inform the jury of the applicable law, do not mislead the jury, and allow both parties to argue their theories of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction

are reviewed de novo. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521 158 P.3d 1193 (2007). Errors in jury instructions are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Defendant challenges jury instruction number 43 and 45, which instructed the jury on how to enter a special verdict. App. Br. at 15-21; CP 278 (Instruction No. 43); CP 280-81 (Instruction No. 45). Jury instruction no. 43 states:

To find that this crime is a major economic offense, the following factor must be proved beyond a reasonable doubt: The crime involved multiple victims or multiple incidents per victim. If you find the evidence that the factor has been proved beyond a reasonable doubt, then it will be your duty to answer “yes” on the special verdict form.

CP 278. Jury instruction no. 45 states, in part:

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 281.

- a. Defendant cannot raise a challenge to the special verdict jury instruction for the first time on appeal.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is

to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984) (citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967)). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); *See State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

Defendant relies on *State v. Bashaw* for his claim that the special verdict instruction was erroneous. App. Br. at 16-17 (citing *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010)). However, the rule adopted in *Bashaw* is not a constitutional rule. *Bashaw*, 169 Wn.2d at 146 n. 7. Rather, the court clearly emphasizes that it is a common law rule. *Bashaw*, 169 Wn.2d at 146 n. 7. Thus, a defendant cannot challenge a special verdict instruction under *Bashaw* for the first time on appeal because such an instruction is not a manifest constitutional error. *See*, RAP 2.5(a). All three divisions of the Court of Appeals have so held, including: *State v. Bertrand*, --Wn. App. --, -- P.3d--(2011)(2011 WL 6097718); *State v. Grimes*, -- Wn. App. --, --P.3d --(2011)(2011 WL

6018399); *State v. Morgan*, 163 Wn. App. 341, 261 P.3d 167 (2011); *State v. Nunez*, 160 Wn. App. 150, 162-163, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011). However, a few panels of Division I of the Court of Appeals have held otherwise. *See, State v. Cham*, --Wn. App.--, --P.3d--(2011)(2011 WL 6148731); *State v. Reyes-Brooks*, --Wn. App.--, --P.3d--(2011)(2011 WL 6016155); and *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011).

In order to challenge this instruction, it must have been objected to at the trial court below. A defendant may not object to an instructional error where it was not objected to below unless the error invades a fundamental right of the accused. *State v. Watkin*, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006).

In the instant case, neither party objected to the wording of the special verdict instruction. *See* RP 579-585. Defendant's only objection regarding the special verdict concerned whether the special verdict required a bifurcated trial in order to present additional evidence. *Id.* Since defendant did not object regarding the language of the instruction at trial, there is no ruling from the trial court to be considered on appeal. As such, this Court should decline to address defendant's challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.

- b. Even if the trial court erred in giving the jury instruction, the error was harmless.

Even if this Court were to determine that the jury instruction regarding the special verdict forms contained an error, defendant must show that the error prejudiced his case; it is subject to a harmless error analysis. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Regarding harmless error, the Supreme Court has held that “[w]hen applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L.Ed.2d 25 (1999)). Therefore, prejudice is not presumed in this case.

The instruction given to the jury in this case differs from the instruction in question in *Bashaw*. In *Bashaw*, the court instructed the jury that “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.” *Bashaw*, 169 Wn.2d at 139. Here, the jury received no specific instruction regarding unanimity of the special verdict. CP 278. However, Jury Instruction no. 45 does instruct the jury with regard to verdict form A, A2, B, and B2: “If you cannot agree on a verdict, do not fill in the blank provided in [the Verdict Form].” CP 281. Thus, the jury instructions provided a method in the case that the jurors could not agree on a verdict. Furthermore, Jury instruction no. 44 stated in part:

You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 279. Unless something in the records suggests otherwise, a jury is presumed to have followed the instructions given. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). As stated in Justice Madsen's dissent in *Bashaw*:

The majority suggests that a different outcome might have resulted under proper instructions. The majority is therefore either suggesting that the jury might not have followed the jury instructions when it returned its unanimous finding – which would be antithetical to the presumption that juries follow the instructions they are given, or the majority is suggesting that the jury was coerced or influenced by the unanimity instruction into reaching a conclusion it would not otherwise have reached – which is equally unacceptable given that unanimity is required for guilty verdicts. We certainly do not infer from a unanimous verdict on guilt that the jury was coerced or improperly influenced by an instruction on unanimity. Why does the majority doubt the unanimous verdict here?

*Bashaw*, 169 Wn.2d at 151 (Madsen, J., dissenting).

To demonstrate actual prejudice, the petitioner would have to show that, instructed properly, the jury would have reached a different decision; i.e. that each count of forgery affected multiple victims or a single victim multiple times. Nothing presented by defendant suggests that the jury would have found any other way given a more proper instruction. Here, the State presented evidence that the respective retailers, the bank, and Mr. Tvedt suffered some injury due to defendant's action. *See infra*, p. 9-10.

The State presented sufficient evidence for the jury to conclude that defendant's action harmed multiple parties.

Defendant is unable to show that the jury's finding on the special verdict would have been different under a different instruction that explicitly instructed the jury on what action to take when unanimous agreement on a special verdict cannot be reached. When considering the instructions given to the jury, it can be inferred that the jurors would have given no answer to the special verdict in cases of disagreement rather than reaching improper consensus as defendant suggests. Because defendant is unable to demonstrate prejudice, any error in the jury instruction was harmless.

3. AS DEFENDANT HAS FAILED TO DEMONSTRATE HOW HIS PLEA WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT, THE COURT SHOULD AFFIRM HIS PLEA OF GUILTY IN ALL THREE CASES.

“Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent.” *In re Bradley*, 165 Wn.2d 934, 939, 205 P.3d 123 (2009) (*quoting In re Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004)). Misinformation regarding sentencing or sentencing consequences constitutes an unknowing plea. *Isadore*, 151 Wn.2d at 298. Although a defendant need not be informed of all possible consequences of the plea agreement, a defendant must be aware of all *direct consequences* of his plea. *Isadore*, 151 Wn.2d at 298. “A direct consequence is one that has a ‘definite, immediate and largely automatic effect on the range of the

defendant's punishment.” *Bradley*, 165 Wn.2d at 939 (quoting *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). Both *Bradley* and *Isadore* concerned defendants who pleaded guilty with the understanding that the State would recommend a specific sentence with specific periods of confinement and community placement. *Bradley*, 151 Wn.2d 934; *Isadore*, 151 Wn.2d 294. In both cases, misunderstanding at the time of agreement lead to a change in the standard sentence range or required community placement. *Id.*

Here, unlike *Bradley* or *Isadore*, defendant stipulated to the aggravating factors found by the jury in the 2008 case and his prior criminal record. CP 89-91; 284-87; 288-90; 326-28. Defendant separately stipulated to the aggravating factor of a major economic crime in the 2007 case, agreeing that it warranted consecutive sentencing in all three cases. CP 89-91.

The State recommended the agreed sentence and defendant had no misunderstanding regarding his prospective sentencing range or required community placement. Unlike *Bradley* or *Isadore*, defendant knew of the direct consequences of his plea agreement. As defendant quotes in his brief, “a defendant *pleads guilty to multiple counts or charges at the same time*, in the same proceedings, and in the same document.” Br. App. at 26 (quoting *State v. Turley*, 149 Wn.2d 395, 402, 69 P.3d 338 (2003) (emphasis added)). As the Supreme Court observed in *Turley*, when a

defendant pleads guilty to two charges at the same time, that agreement is an indivisible agreement. *Turley*, 149 Wn.2d at 400.

Here, defendant did not plead guilty to any of the charges in the 2008 case. At the time he pleaded guilty in the 2007 and 2009 cases, he had already been convicted by a jury in the 2008 case. Thus, the outcome of the jury trial, having already occurred, was not an element that defendant agreed to when he pleaded guilty in the other two cases. Although defendant may have formed his decision to plead guilty on the trial's outcome, the direct consequences of his plea agreement in the 2007 and 2009 cases did not change based on that trial's outcome. Any change to the outcome of the trial would have no substantial effect on the direct consequences of defendant's plea agreement. Thus, defendant appropriately understood the sentencing range and the direct consequences of his pleading guilty in the 2007 and 2009 cases when he made his plea.

Defendant failed to show that his plea of guilty was based on misinformation regarding a direct consequence of his plea. Defendant's plea of guilty should be affirmed.

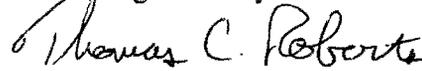
D. CONCLUSION.

Defendant has failed to show that the State did not present sufficient evidence for a jury to conclude defendant committed the questioned crimes of forgery within the State of Washington. In addition, the State presented sufficient evidence for the jury to find him guilty of theft in the second degree. As defendant failed to object to the special

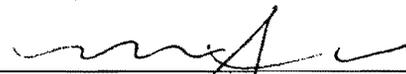
verdict jury instruction at trial, he cannot raise that issue for the first time on appeal. Furthermore, as defendant's plea agreement in the other cause numbers was separate from the jury's finding of guilty in the 2008 case, he entered into the plea agreement properly knowing the direct consequences of the agreement. For the reasons argued, the outcome of the trial court below should be affirmed.

DATED: February 2, 2012.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



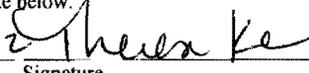
THOMAS C. ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442



Andrew Asplund  
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2.3.12   
Date Signature

# PIERCE COUNTY PROSECUTOR

## February 03, 2012 - 10:43 AM

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