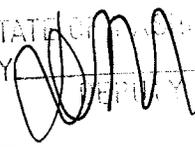


STATE OF WASHINGTON
DIVISION II
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STATE OF WASHINGTON
BY: 

NO. 41319-1-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JENNIFER MEGAN MAU,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against her for making a false claim of insurance under RCW 48.30.230 because substantial evidence does not support the conclusion that the defendant made a claim under a “contract of insurance” as is required for conviction under the statute.

Issues Pertaining to Assignment of Error

When a person makes a tort claim that a truck rental company’s negligence has caused her damage, has she made a claim under a “contract of insurance” sufficient to support a conviction under RCW 48.30.230.

STATEMENT OF THE CASE

Factual History

On March 30, 2007, the defendant Jennifer Mau rented a U-Haul truck in Olympia to facilitate her family's move from a rented house in Centralia to their new mobile home in Morton. RP 20-23. Her family, including her husband David Eaton, her two children, and two of David's children, had been living in a rental home after their house in Morton had been destroyed by fire. RP 267-271. When the defendant rented the truck, the manager of the U-haul dealership asked if she would like to pay for "safe move protection," which would pay for the property she was moving if it was damaged by an accident. RP 39, 84. U-Haul's "safe move protection" does not pay for water damage. *Id.* The defendant paid the extra few dollars for the "safe move protection." *Id.*

After renting the truck, the defendant and her family members went to a local "Best Buy" store to pick up merchandise they had purchased for their new home, and then drove to a storage unit to pick up furniture and other items that they had previously purchased. RP272-385. They then drove to Morton, arriving later in the day. *Id.* According to the defendant, when they unpacked the truck, they found that a number of items in the front of the cargo space had been damaged by water that had leaked into the cargo space during the move. *Id.* The defendant reported that they were able to dry and

salvage some of those items, although some of the items were destroyed and they ended up taking them to the dump. *Id.*

When the defendant took the truck back, she complained that it had leaked and damaged or destroyed some of her property. RP 25-27. In response, the manager of the U-haul outlet gave the defendant the telephone number of Republic Western Insurance so she could make a claim. *Id.* The defendant later called that number to report her loss. RP 38-39. In fact, Republic Western Insurance is a subsidiary company wholly owned by the U-Haul Corporation, which is self-insured for all of its general liability claims. RP 49. Michael Larsen, a special investigator for Republic Western, was later assigned to investigate the case. RP 36-38.

According to Mr. Larsen, there are two types of claims that a person can make against “U-Haul” for property damaged while using a “U-Haul” truck. RP 47-48. The first is under the “safe move protection” plan, if the customer paid for it. *Id.* According to Mr. Larsen, “[i]t’s not like an insurance.” RP 38-39. Rather, it simply pays for cargo damaged as the result of accident during a move. *Id.* It does not pay for water damage. RP 41-44. The second is under a general liability claim for negligence. RP 47-48. Based upon the defendant’s statements, Mr. Larsen opened up a general liability claim. RP 39-41. On April, 19, 2007, he contacted an independent adjuster by the name of Reilly Gibby to investigate the defendant’s claim. RP

41-44.

Once Mr. Gibby received the assignment from Mr. Larsen, he called the defendant and arranged to meet her at Spiffy's Restaurant in Morton to talk about her claim. RP 61-64, The next day, he drove to Morton and met with the defendant for 1.4 hours, during which time he had her fill out an inventory sheet listing the items that had been damaged and their value along with items that had not been damaged. PR 64-69. The sheet ran for seven pages and included a claim for almost \$16,000.00 in damage. RP 45-46, 64-69.. Mr. Gibby followed up this interview with a number of telephone conversations with the defendant. RP 78-80. On May 7, 2007, he came back to Spiffy's Restaurant in Morton to interview the defendant's husband, who verified the defendant's claims that a number of items had been damaged or destroyed by water that had leaked into the truck during their move. RP 80-82. Two weeks after Mr. Gibby met with the defendant's husband, he sent his final report back to Mr. Larsen at Republic Western. RP 82.

Eventually, Mr. Larsen made a determination that there had been no negligence on the part of U-Haul as their testing on the truck had been unable to replicate a water leak. RP 41-44. As a result, Republic Western sent a letter to the defendant denying her claims. RP 45-46. Employees for the Washington State Office of the Insurance Commissioner later did an investigation on the defendant's claim and developed information that led

them to believe that (1) there had been no water damage to any of the defendant's property, and (2) that the defendant and her husband had knowingly made a false claim to U-Haul of over \$1,500.00. RP 196-206.

Procedural History

By informations filed March 17, 2010, the Lewis County Prosecutor charged the defendant Jennifer Mau and her husband David Eden under RCW 48.30.230 with one count of making a false insurance claim. CP 1-3. This case later came on for a joint trial, with the state calling seven witnesses, including the U-Haul manager who rented the defendant the truck, along with Mr. Larsen, Mr. Gibby, and one of the investigators from the Washington State Insurance Adjustor's Office. RP 20, 30, 36, 58, 111, 169, 196. These witnesses testified to the facts contained in the preceding *Factual History*. See *Factual History*. The state also called Arlene Black as a witness. RP 111. Ms Black is married to one of Mr. Eden's sons, and she claimed that (1) she had helped the defendant and her husband move into their new mobile home in Morton, (2) that none of the defendant's property had been damaged by water or anything else, (3) that many of the items the defendant claimed had been destroyed and taken to the dump were still in the defendant's home, and (4) that she had overheard the defendant ask another person to give a false statement to support the claim that some of the defendant's property had been damaged by water during the move. RP 111-141.

After the state closed its case, the defense called three witnesses. RP 213, 223, 242. Two of these witnesses testified that they were present during the move and had witnessed the water damage to the defendant's property. RP 223-231, 242-251. The third witness was a resident of Morton, who testified that he had walked by the defendant's residence as they were moving in, that it had been raining, that he had seen some damage to the roof over the front of the cargo area, and that he had contacted the defendant to tell her about the damage and the possibility of water leaking into the truck. RP 213-222. Finally, the defendant took the stand and testified that the truck had leaked and damaged her property, and that her claim of damages had been truthful. RP 267-379.

After brief rebuttal evidence, the court instructed the jury and the parties presented closing argument. RP 339-408, 409-472. The jury then retired for deliberation, eventually returned verdicts of "guilty" against both the defendant and her husband. CP 54; RP 354-357. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 71-80.

ARGUMENT

THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HER FOR AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with one count of making a false claim pursuant to a contract of insurance under RCW 48.30.230. This statute states as follows:

- (1) It is unlawful for any person, knowing it to be such, to:
 - (a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or
 - (b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

RCW 48.30.230.

The gravamen of this offense is to “knowingly” make a false or fraudulent claim “under a contract of insurance,” or to “knowingly” “prepare, make, or subscribe” any false documents with the intent that they be used to

make a false or fraudulent claim “under a contract of insurance.” Although the conduct required for conviction under the statute would undoubtedly constitute an attempted theft under RCW 9A.56, there are two critical differences between RCW 48.30.230 and Washington’s theft statutes. The first is that the submission of an unsuccessful false claim under RCW 48.30.230 is a completed crime, whereas it is only an inchoate crime under RCW 9A.56. At present this distinction is not merely academic because the unsuccessful false presentation of a claim for over \$1,500.00 is a class C felony under RCW 48.30.230. By contrast, the same conduct will currently only support a conviction for a gross misdemeanor if charged as an attempted second degree theft.

The second difference between RCW 48.30.230 and Washington’s theft statutes, and the critical difference in the case at bar, is that the former only applies if the false claim is made “under a contract of insurance.” Thus, in order to support the conviction in this case, there must be evidence in the record to support the conclusions that the defendant made a claim “under a contract of insurance.” As the following explains, there is no such evidence in the case at bar because (1) the defendant made a general liability claim against U-Haul, not a claim under the “safe move protection” coverage, and (2) U-Haul’s “safe move protection” coverage is not a “contract of insurance.”

(1) Substantial Evidence Only Supports the Conclusion That the Defendant Made a General Liability Claim Against U-Haul.

In the case at bar, the evidence, seen in the light most favorable to the state, indicates that the defendant made a claim that her property had been damaged when the U-Haul truck she rented leaked rainwater into the cargo area of the truck. Although the defendant did not fill out any form or writing to initiate the claim, Michael Larsen was able to testify concerning the record of her initial call to Republic Western. According to him, Republic Western's records showed that she had called making a claim that U-Haul had been negligent in maintaining the truck she had rented, and that the water damage to her property was the result of that negligence. Based upon her call, Republic Western opened a general liability claim, not a claim under the "safe move protection" provisions.

In addition, the record presented at trial also includes the testimony of Mr. Gibby concerning his conversations with the defendant concerning her claims. At no point during his testimony did Mr. Gibby claim that the defendant had made an argument that her loss was covered under the "safe move protection" provisions. Rather, his testimony was that she had claimed that U-Haul was liable because it had failed to maintain the truck she used. Although the bulk of their conversations involved the issue of what was damaged and the value, there is nothing from his testimony from which one

can infer that the defendant made a claim under the “safe move protection” provisions.

As Mr. Larsen explained during his testimony, the defendant’s claim of damages was under a theory of negligence. It had nothing to do with a policy of insurance, and its validity did not turn on either the existence or non-existence of “safe move protection” coverage. Thus, in the case at bar, there is no evidence, substantial or otherwise, that the defendant made a claim under the “safe move protection” provisions, even were this court to ultimately find that it constituted a “contract of insurance.”

(2) U-Haul’s “Safe Move Protection” Plan is Not a “Contract of Insurance” Under RCW 48.30.230.

Although used in RCW 48.30.230 and in a number of other statutes involving insurance, the term “under a contract of insurance” is not defined by the legislature. In addition, few reported cases in Washington even mention RCW 48.30.230, much less address what “under a contract of insurance” means. However, while the phrase is not specifically defined, there are at least two arguments as to why U-Haul’s “safe move protection” does not constitute a “contract of insurance.” First, as Michael Larsen explained in his testimony, Republic Western did not consider U-Haul’s “safe move protection” as a contract of insurance. He stated the following concerning this point:

U-haul is self-insured. There's typically two types of claims that we see. General Liability claims would be claims where if there was a defect it would fall under a general liability. The other applicable coverage would be safe move protection is what we like to call it. *It's a coverage, it's not like an insurance*, but it's a coverage and it would cover the cargo in the event of an accident, upset or overturn. But it does have exclusions, water being one of them.

RP 38-39 (emphasis added).

Second, and more telling, it should be noted that under the laws of Washington State a person must be licensed in order to legally sell policies of insurance. Under RCW 48.17.060, it states as follows:

A person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line of authority in accordance with this chapter. A person may not act as or hold himself or herself out to be an adjuster in this state unless licensed by the commissioner or otherwise authorized to act as an adjuster under this chapter.

RCW 48.17.060.

In the case at bar, there is no suggestion that the employees of U-Haul are insurance agents license to sell, solicit, or negotiate insurance. Neither is there any evidence that Meisha Malmer, who filled out the rental contract on the truck for the defendant, was an insurance agent licensed under RCW 48.17.060. The reason there is no evidence is that U-haul employees who fill out vehicle rental contracts for customers, and who ask if a customer wants "safe move protection," are not selling, soliciting, or negotiating contracts of insurance under RCW 48.17.060 because "safe move protection" is not a

contract of insurance. Thus, in the case at bar, even if there was substantial evidence to support the conclusions that the defendant had made a claim under the “safe move protection” provision of the rental contract, that claim was not one made under a “contract of insurance.”

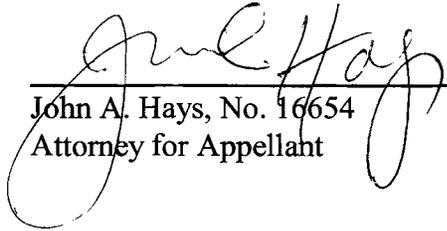
Since the “safe move protection” in this case was not a “contract of insurance,” substantial evidence does not support the finding on this critical element of the crime charged. Consequently, entry of the judgment of conviction for making a false claim of insurance violated the defendant’s right to due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant’s conviction and remand with instructions to dismiss with prejudice.

CONCLUSION

The defendant's conviction should be vacated and the case remanded with instructions to dismiss with prejudice.

DATED this 30th day of March, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 48.17.060
License required

A person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line of authority in accordance with this chapter. A person may not act as or hold himself or herself out to be an adjuster in this state unless licensed by the commissioner or otherwise authorized to act as an adjuster under this chapter.

RCW 48.30.230
False Claims or Proof — Penalty

(1) It is unlawful for any person, knowing it to be such, to:

(a) Present, or cause to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss under a contract of insurance; or

(b) Prepare, make, or subscribe any false or fraudulent account, certificate, affidavit, or proof of loss, or other document or writing, with intent that it be presented or used in support of such a claim.

(2)(a) Except as provided in (b) of this subsection, a violation of this section is a gross misdemeanor.

(b) If the claim is in excess of one thousand five hundred dollars, the violation is a class C felony punishable according to chapter 9A.20 RCW.

COURT OF APPEALS
DIVISION II

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

**STATE OF WASHINGTON,
Respondent,**

APPEAL NO: 41319-1-II

vs.

AFFIRMATION OF SERVICE

**Jennifer Megan Mau,
Appellant.**

**STATE OF WASHINGTON)
) vs.
COUNTY OF LEWIS)**

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **March 30, 2011**, I personally placed in the mail the following documents

- 1. **BRIEF OF APPELLANT**
- 2.. **AFFIRMATION OF SERVICE**

to the following:

**MICHAEL GOLDEN
LEWIS COUNTY PROS. ATTY
345 W. MAIN ST.
CHEHALIS, WA 98532**

**JENNIFER M. MAU
757 MAIN AVE
P.O. BOX 1613
MORTON, WA 98356**

Dated this 30TH day of MARCH, 2011 at LONGVIEW, Washington.

Cathy Russell
**CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS**