

NO. 45782-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDY HUESKE,

Appellant.

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

The Honorable Kevin D. Hull, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to present a defense when the trial court excluded important defense evidence.

Issue Pertaining to Assignment of Error

Both the state and federal constitutions guarantee every criminal defendant the right to present a defense and challenge the State's evidence and its witnesses. The verdicts in appellant's case turned on whether jurors believed appellant was an unknowing participant in the charged crimes or a knowing accomplice. In an attempt to prove that he was the former, appellant sought to introduce evidence supporting a conclusion his alleged accomplice was solely to blame. Did the trial court's exclusion of this evidence violate appellant's constitutional rights?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County Prosecutor's Office charged Randy Hueske with one count of Theft in the Second Degree and one count of Identify Theft in the First Degree in connection with the unauthorized deposit of a check and subsequent withdrawal of the deposited funds. CP 5-6, 12-15. Hueske was charged as an accomplice to Sarah Silva. CP 5-6, 13.

A jury found Hueske guilty as charged. CP 40. The Honorable Kevin D. Hull imposed a standard range 38-month sentence. CP 46. Hueske timely filed his Notice of Appeal. CP 58.

## 2. Trial Testimony

Sherry Duke and her mother, Carma Sonsteng, had a joint checking account at Kitsap Credit Union. RP 49. In March 2013, Sonsteng discovered that checks associated with the account were missing. RP 49-50. The following month, Duke and Sonsteng learned that some of these checks were being cashed. RP 49-50.

One of these checks was deposited to the Kitsap Credit Union account of Randy Hueske on April 9, 2013. RP 69-70, 74. The check is made out to Hueske for \$2,100.00, endorsed on the back by Hueske, contains a signature that says "Sherry Duke," and, on the memo line, indicates the payment is for "fixing the Volvo." RP 62, 75-76; exhibit 3. Duke does not know Hueske, she did not sign the check, and neither she nor her mother owns a Volvo or had any reason to owe Hueske money. RP 53-55.

ATM video cameras recorded the April 9 deposit. They show Sarah Silva and Hueske depositing the check into Hueske's account, withdrawing \$380.00 (the largest amount immediately

available<sup>1</sup>), dividing the cash, and walking away. RP 95-107. The balance of the \$2,100.00 was available for withdrawal two days later. RP 69, 107. On April 12, these remaining funds were used in their entirety in two separate transactions – a debit card purchase and an in-person cash withdrawal at a Credit Union branch. RP 106-107, 113-115. The Credit Union did not obtain video for this subsequent cash withdrawal. RP 114.

On April 22, 2013, Bremerton Police Officer Jeffrey Inklebarger arrested Hueske at his home. RP 120-121. Inklebarger explained that the check he deposited on April 9 had been stolen. RP 122. Hueske initially said he met a lady at an auto parts store, he did not know her name, and she paid him the \$2,100.00 for repairs on her car. RP 122, 139. Hueske also initially said he did not know the make of the car he had repaired, but then said it was a Ford. RP 123. On the drive to jail, Hueske eventually identified the woman as “Sarah,” whom Inklebarger knew to be Sarah Silva from multiple prior contacts with her and

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<sup>1</sup> Typically, \$400.00 is immediately available for an ATM withdrawal, but Hueske began with a negative account balance. RP 103, 113.

from watching the ATM video. RP 124-125, 137, 139. Silva drives a Ford sedan. RP 137.

The evidence was undisputed that Hueske makes money outside his construction job fixing cars. RP 174, 176-178, 183. And in March 2013, he had done repair work on Silva's Ford. RP 175. Hueske testified that Silva had given him the check at issue for payment on this work, work he had done on another car, and future work. RP 183. At the time of the deposit, Hueske was recovering from recent surgery and taking prescription Oxycodone and Vicodin. RP 184-185. When speaking to Officer Inklebarger, Hueske attributed his initial inability to identify the circumstances under which he received the check (including Sarah's name) to the effects of the painkillers. RP 185-186. He admitted he did not look at the face of the check Silva had given him before endorsing and depositing it. RP 188.

In addition to the check deposited on April 9, there was a second check from the Duke/Sonsteng account, briefly referenced during Officer Inklebarger's testimony, that was deposited to Hueske's account. RP 119. The defense sought to present evidence associated with this check. RP 82-84, 89-92, 126, 130-

132. The prosecution objected on grounds of relevance and juror confusion. RP 84, 87, 90-91, 131.

An offer of proof established that on April 13, after all funds from the \$2,100.00 check of April 9 had been exhausted, ATM cameras captured Sarah Silva depositing a second stolen check written for \$450.00. RP 86, 127-128. Silva deposited this check into Hueske's account using Hueske's bankcard, but Hueske was not present. RP 88-89, 127. The court excluded this evidence on relevance grounds. RP 92, 132-133.

During closing argument, the prosecutor described Sarah Silva as the mastermind (the principal) in these crimes and Hueske as her accomplice. RP 203. He noted the facts were largely undisputed, and jurors' verdicts would turn on whether Hueske was a knowing participant in the scheme. The prosecution argued he was. RP 204-219. In contrast, defense counsel argued that Silva had taken advantage of Hueske. His only intent was to get paid for his work and he had no idea the check was stolen or fraudulent. RP 220, 224-234. He was, perhaps, an unsophisticated stooge, but he was not a criminal in this matter. RP 226.

C. ARGUMENT

HUESKE WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE COURT PROHIBITED EVIDENCE OF SILVA'S SUBSEQUENT DEPOSIT.

The Sixth and Fourteenth Amendments to the United States Constitution,<sup>2</sup> and article 1, § 21 of the Washington Constitution,<sup>3</sup> guarantee a defendant the right to defend against the State's allegations, including the right to present evidence in his defense. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d

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<sup>2</sup> The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

<sup>3</sup> Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

Absent a valid justification, excluding relevant defense evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane v. Kentucky, 476 U.S. 683, 690-691, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it, meaning the evidence would disrupt the fairness of the fact-finding process. If the State cannot do so, the evidence must be admitted. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). For evidence with high probative value, it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16).

This Court reviews a claimed denial of Sixth Amendment rights de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576

(2010) (citing State v. Iniguez, 167 Wn.2d 273, 280-281, 217 P.3d 768 (2009)).

Judge Hull precluded evidence of the subsequent deposit on relevancy grounds. This was error. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Hueske did not deny endorsing and depositing the stolen and forged check. He simply denied that he was a knowing participant in the scheme. His only intent was to get paid for his work and he had no reason to believe the check was illegitimate. Hueske – not unlike Sherry Duke, Carma Sonsteng, and Kitsap Credit Union – had been taken advantage of and victimized by Sarah Silva. Even the State theorized that that the scheme was Silva’s brainchild. RP 203.

Based on the defense theory, the relevance of Silva’s subsequent deposit of a stolen check into Hueske’s account is clear. It was consistent with, and supported, the notion that Silva (and only Silva) knew what was going on and took advantage of Hueske’s lack of sophistication. Just as she had used Hueske’s

account to obtain cash from a stolen check on April 9, she was doing the same on April 13. And, notably, this time she was alone.

It is a safe bet that, had video of the April 13 deposit shown Silva *and* Hueske, the State would have sought to use evidence of that deposit to prove Hueske was not the clueless victim he claimed to be on April 9 and, instead, was a knowing and willing participant in the scheme. Since the video shows the opposite (Silva using the account on her own), it tends to support the notion that Hueske was a hapless victim rather than a loyal minion.

The proposed defense evidence went to the heart of the defense case – demonstrating reason to doubt the State’s view that Hueske was an accomplice. In contrast, there was no valid reason, much less a compelling one, to exclude this evidence from consideration. Under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, § 21 of the Washington Constitution, Hueske was entitled to present this evidence as part of his trial defense.

Reversal is required unless this Court is “convinced beyond a reasonable doubt that any reasonable [trier of fact] would have reached the same result without the error.” Jones, 168 Wn.2d at 724 (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74

(2002)). No one claimed that Hueske stole the checks involved and there is no evidence to support such a claim. Moreover, other than Hueske (who proclaimed his innocence), Silva was the only person who could definitively testify to Hueske's knowledge and she did not take the stand. In a case where the State was forced to rely on inferences from the available evidence to establish Hueske's intent, the excluded evidence was critical indeed. Because the State cannot show that exclusion of that evidence was harmless beyond a reasonable doubt, Hueske must receive a new trial.

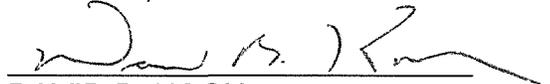
D. CONCLUSION

Hueske was denied his constitutional right to present a defense. His convictions should be reversed and his case remanded for a new trial – one in which the jury considers all relevant defense evidence.

DATED this 16<sup>th</sup> day of June, 2014.

Respectfully submitted,

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Attorneys for Appellant

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DIVISION TWO

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Respondent,	)	
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v.	)	COA NO. 45782-2-II
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RANDY HUESKE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF JUNE 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RANDY HUESKE  
DOC NO. 292751  
OLYMPIC CORRECTIONS CENTER  
11235 HOH MAINLINE  
FORKS, WA 98331

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF JUNE 2014.

x *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**June 16, 2014 - 1:48 PM**

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Court of Appeals Case Number: 45782-2

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