

NO. 45782-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY ALLEN HUESKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00511-3

BRIEF OF RESPONDENT

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SERVICE	Eric J. Nielsen 1908 E Madison Street Seattle, WA 98122-2842 Email: nielsene@nwattorney.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i> . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the  foregoing is true and correct. DATED October 9, 2014, Port Orchard, WA _____ Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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RULES

ER 401 9

I. COUNTERSTATEMENT OF THE ISSUE

Whether the trial court properly excluded irrelevant evidence of Hueske's accomplice taking money out of an ATM in a transaction that was unrelated to the charged offense?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Randy Allen Hueske was charged by information filed in Kitsap County Superior Court with second-degree theft and first-degree identity theft, based on being an accomplice to the cashing of a stolen and forged check. CP 12-13. A jury found him guilty as charged. CP 40.

During trial, Hueske sought to admit video evidence of his accomplice, Sarah Silva, withdrawing cash from Hueske's account at an ATM on April 13. RP 82-83. Hueske did not appear in the video, and he argued it was relevant to show that Silva, not Hueske, had his ATM card at the relevant time. RP 83.

The State responded that the video was irrelevant because the forged check was deposited at an ATM on April 9 and posted to Hueske's account on April 10. RP 84. Both Hueske and Silva appeared in the video of that transaction. RP 84-85. Hueske withdraw the maximum permitted amount immediately after making the deposit. RP 85. Additionally, a total of \$2100, the amount of the check, was withdrawn within 48 hours,

or no later than April 12. RP 95. Finally, the second video also showed Silva depositing another forged check for \$450 into Hueske's account. RP 85. The account was not credited because of report of stolen check. RP 85.

In an offer of proof, the credit union's loss prevention officer testified that the initial deposit of \$2100 was made on April 9. RP 86. Funds were withdrawn on April 12 at an ATM, and then the remainder were withdrawn in a branch transaction. RP 86. Another check for \$450 was deposited into the ATM on April 13. RP 86. The \$2100 was already gone from the account at that time. RP 86.

The credit union officer made a further offer of proof that Hueske was not in the video of the April 13 ATM deposit. RP 88. It was only Silva. RP 88. However, there was no way to deposit to an account without using the account holder's debit card. RP 89.

Hueske then argued that the video supported his claim that he had not made the withdrawals. RP 89. Hueske had told the police that Silva must have stolen his card. RP 89.

The State responded that the theft was complete once the money was deposited, regardless of who withdrew it. RP 90. The issue was whether Hueske acted as an accomplice to provide the bank account to further the theft of the \$2100, and the identity theft by using the victims'

bank account number. RP 90. The subsequent deposit had nothing to do with the \$2100. RP 91.

The trial court agreed that the evidence was irrelevant. RP 92. It nevertheless gave Hueske permission to renew his motion at completion of direct testimony. RP 92.

During the testimony of the investigating officer, Hueske renewed his request to admit the second deposit evidence. RP 126. In an offer of proof, the officer stated that he had viewed the surveillance footage pertaining to the second deposit. RP 127. Silva, but not Hueske, was in the video. RP 127. Silva drove up in a Ford Taurus. RP 127. Hueske asserted the evidence was relevant to corroborate Hueske's assertion that he fixed a Ford. RP 128. The police investigation confirmed that Silva was previously associated with the Ford in the video.

Hueske clarified he was making two requests: (1) admission of the video of the second deposit, and (2) confirmation that Silva drove a Ford RP 130. The State had no objection to the Ford evidence, but continued to object to the deposit evidence. RP 130-31. The court adhered to its previous ruling on the video, but permitted Hueske to ask the officer about the Ford. RP 133.

B. FACTS

Sherry Duke had a joint checking account with her mother, Carma

Sonsteng, at Kitsap Credit Union. RP 49. Sonsteng became aware that some checkbooks were missing from her house. RP 49. About a month later, Duke received a call from the credit union that some of the missing checks were being cashed. RP 49-50.

One of the checks stolen from Sonsteng's house was cashed for \$2100. RP 53-54. Duke did not sign the check; it was not her signature on it. RP 53.

The check was made out to Randy Hueske and endorsed by him on the back. RP 119. Duke did not know Hueske. RP 54. Nor did she know Sarah Silva. RP 54, 56.

Duke had no reason to owe Hueske \$2100.00. RP 54. The memo line on the check read "fixing the Volvo." RP 75. At the time, Duke owned a 2002 Ford Taurus and Sonsteng had a 1987 Honda. RP 55. They never contracted with Hueske to do work on their cars. RP 55.

The loss prevention officer at Kitsap Credit Union determined that Hueske, who was also a member of the credit union, had deposited the check Duke reported stolen into his account. RP 62, 74. The signature on the stolen check did not match Duke's signature on the her account card. RP 65.

The check was deposited at an ATM at a Kitsap Credit Union

branch in Bremerton. RP 67. The machine automatically recorded a video of the transaction. RP 68; *see* Exh. 4.

In the video, Hueske and Silva came up to the ATM. RP 71, 100, 124. Hueske took his debit card out of his wallet and put it into the machine. RP 100. He made a deposit and put the envelope with the check into the machine. RP 101. The timestamp showed the transaction took place on April 9, 2013 at 9:33 p.m. RP 101. Hueske had the possession of the envelope. RP 102.

The machine then provided a balance receipt. RP 102. The receipt showed that the available balance was \$381.69. RP 103. Even though the deposit was for \$2100, credit union policy would only allow immediate access to \$500. RP 103. The available balance was not \$500 because Hueske's balance was negative at the time the deposit was made. RP 113.

The card was then reinserted into the machine and \$380 was withdrawn. RP 104. The video then showed the money in Silva's hand. RP 105. She counted the money, and then handed some of it to Hueske. RP 105. They then walked away. RP 105.

A second camera view showed Hueske taking out his card and inserting it in the machine. RP 106. The deposit envelope was inserted. RP 106. Then, when the withdrawal was made, Silva grabbed the cash from the machine. RP 107.

Two days later, after the hold was released, the rest of the cash from the check was withdrawn. RP 107. The remaining funds were withdrawn in multiple transactions. RP 114. One was at an ATM and a second was in a branch. RP 114. There was no video available of these transactions. RP 114. However, a branch transaction would require ID to complete a withdrawal. RP 115.

Bremerton Police Officer Jeffrey Inklebarger contacted Hueske at home after speaking with the victims and the credit union personnel. RP 120. Inklebarger placed Hueske under arrest and advised him of his rights. RP 121. Hueske waived his rights and told Inklebarger that he had met an unknown woman at an auto parts store who paid him \$2100 to do some repairs on her car. RP 122. Hueske asserted that he did not know the name of the woman. RP 139.

Inklebarger asked Hueske what kind of car it was, and Hueske initially claimed that he did not know. RP 123. Then he said it was a Ford, possibly an Escort. RP 123. On the way to the jail, Hueske continued to assert that the car was a Ford, but that the unknown woman was named Sarah. RP 124.

In defense, Hueske's stepfather testified that Hueske lived with him and occasionally fixed cars for money. RP 174. He asserted that Hueske had worked on Sarah Silva's car around March. RP 174-75.

Officer Inklebarger had testified that Silva was associated with a Ford. RP 137.

Roy Farve testified that Hueske agreed to work on his car. RP 176. Farve did not have the money at the time, so Silva volunteered to pay Hueske, and Farve was to pay her back. RP 176. However, Hueske never actually performed the work; Farve did not actually owe him any money. RP 178.

Hueske testified that he did construction work but repaired cars on the side. RP 183. He admitted that he and Silva were in the ATM video. RP 183. He asserted that he was depositing a check she gave him for working on her car and another car. RP 183. However, he did not look at the check before he deposited it. RP 188. On cross, Hueske claimed he only knew Silva from working on her car. RP 187. He had not known her long. RP 187.

He also claimed that Silva was there because he was medicated from his surgery and could not figure out how to get the ATM deposit envelope. RP 184. The surgery was two and a half weeks earlier. RP 184. He was taking oxycodone and Vicodin. RP 185.

Hueske claimed he had taken the medications before talking to Inklebarger too. RP 185. It made it hard for him to focus. RP 185. Inklebarger confirmed that at the time of his arrest, Hueske indicated that

he had had surgery. RP 138. Nevertheless, Hueske did not display any confusion when Inklebarger spoke with him. RP 138.

III. ARGUMENT

THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE OF HUESKE'S ACCOMPLICE TAKING MONEY OUT OF AN ATM IN A TRANSACTION THAT WAS UNRELATED TO THE CHARGED OFFENSE.

Hueske argues that the trial court erred in excluding video evidence of Silva at an ATM depositing a second forged check into his account on April 13. The trial court properly determined that this evidence was irrelevant. The forged check was deposited on April 9 and the proceeds were all withdrawn by April 12. Moreover, the proposed evidence was equivocal at best as to the issue of whether Silva and Hueske acted in concert. As such even, if the court erred, the error would be harmless.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided it the same way. *Thomas*, 150 Wn.2d at 869.

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. Under this rule there must be a logical nexus between the evidence and the fact to be established. *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000), *review denied*, 143 Wn.2d 1004 (2001).

Here, there was no dispute that Silva was involved in the theft. The issue was whether Hueske was *also* involved in it. The video of Silva attempting to deposit the second forged check merely bolstered the undisputed former fact. It shed no light whatsoever on the salient issue: whether Hueske was her accomplice. As such, there was no logical nexus between the facts shown in the video and the theory Hueske sought to prove. The trial court therefore properly concluded that the video, which was taken after the proceeds of the check that was the subject of the charges against Hueske were completely withdrawn from his account, was not relevant.

Hueske argues that the video of Silva depositing the check alone supported his theory of the case that he was duped by Silva. He overlooks several pieces of evidence that bear on this question, however.

First is that the credit union officer testified that to make an ATM deposit the account holder’s PIN was required. Hueske offered no evidence that would explain how Silva, whom Hueske claimed to barely

know, would have obtained his PIN. Without any explanation of how Silva obtained the PIN, the most reasonable inference to be drawn would be that they were working together.

Secondly, the credit union officer also testified one of the withdrawals that *was* the subject of the charges was a branch transaction. She further explained that a branch withdrawal would require ID. Hueske fails to explain how Silva would have accomplished this withdrawal without Hueske's assistance.

Because the video evidence was equally susceptible of an interpretation that supported the State's view of the evidence, Hueske failed to show that it was relevant. The trial court therefore did not abuse its discretion.

With regard to the constitutional aspect of Hueske's claim, a defendant's constitutional right to present evidence in support of his case is limited by the requirement that the proffered evidence not be "otherwise inadmissible." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). This is because "a criminal defendant has no constitutional right to have irrelevant evidence admitted." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Since the evidence Hueske proffered was not relevant, the trial court's ruling did not violate his constitutional right to

present a defense.

Finally, in view of the foregoing, any purported error would be harmless. The jury was made well aware of Silva's involvement in the crime. Introduction of the video would in no way have made Hueske's involvement in the crime less likely. To the contrary, as noted, Silva's independent use of Hueske's card suggests they were working in concert. At the very least, it would have cast more doubt on Hueske's credibility. How would a woman he claimed to barely know obtain his PIN number?

Additionally, the remaining evidence was overwhelming. The jury viewed the video of Hueske depositing the check. The video showed Hueske splitting the withdrawal at the ATM with Silva. If, as he claimed, she was paying him for working on her car, why would he be giving her half the money?

Further, other evidence damaged the credibility of Hueske's story. Three witnesses testified that he worked on cars to supplement his income. Yet, he claimed not to even recall the make, and then model of the car he worked on? This is implausible at best. His excuse for that was his medications. However, the officer testified that Hueske displayed no sign of being affected by medication.

Hueske also claimed that Silva went to the ATM with him because due to his medication, he could not figure out how to use the deposit

envelope. However, the video clearly showed him walking normally up to the ATM and then performing all the transactions without difficulty. And, again, he failed to explain why he gave back to Silva half the money that she supposedly paid him for car repairs.

Hueske also failed to explain why, if the money was for working on Silva's Ford, the memo line on the check referred to a Volvo. Nor did he offer any reason why he would accept a check from Silva that was clearly drawn on someone else's account. He testified that he never looked at the check. Again, this claim is preposterous. His account was overdrawn and he clearly needed the money. It simply cannot be believed that someone who performed \$2100 worth of work for an alleged near-stranger would not have looked at the check offered in payment for those services.

IV. CONCLUSION

For the foregoing reasons, Hueske's conviction and sentence should be affirmed.

DATED October 9, 2014.

Respectfully submitted,
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A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

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