

COA No. 29540-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

VIANNEY VASQUEZ, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support the forgery convictions.

Issue Pertaining to Assignment of Error

1. Can the forgery convictions be upheld when the State failed to prove Vianney Vasquez acted with the intent to injure or defraud? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Vasquez was charged by amended information with two counts of forgery, one involving a social security card and the other a resident alien card. (CP 22). The case proceeded to jury trial.

On July 28, 2010, Timothy Englund was working store security in plain clothes at the Safeway on 5th and Lincoln in Yakima. (Vol. II Trial RP 40, 42). He came into contact with Mr. Vasquez after observing him pick up hand lotion and squirt a considerable amount onto his hands. (*Id.* at 43). Mr. Vasquez then went up front to the movie display and looked at movies for a long time. (*Id.*). Mr. Englund maintained visual observation as he left the store. (*Id.*).

Identifying himself as store security, Mr. Englund contacted Mr. Vasquez, who came back inside willingly and was cooperative.

(Vol. II Trial RP 43). They went to the management office, where Mr. Englund started the paperwork for a shop lift. (*Id.* at 44). He asked for his name, address, telephone number, height, weight, age, hair color, and eye color. (*Id.*). Mr. Englund did a weapons pat down for safety and sought some form of government ID. (*Id.* at 45). Doing a search, Mr. Englund found a wallet in Mr. Vasquez's back pocket with two forms of ID – a social security card as well as a permanent resident card. (*Id.* at 45-46). He looked inside the wallet to get the ID. (*Id.* at 46, 56).

Answering Mr. Englund's questions, Mr. Vasquez said he got the social security card and permanent resident card for \$50 each from a friend in California. (Vol. II Trial RP 47). Mr. Vasquez said they were his and were fake. (*Id.* at 55). They had his true name, Vianney Vasquez, on them. (*Id.* at 67). Mr. Englund was going to do a courtesy release of Mr. Vasquez with a trespass letter, but called police as standard procedure because he could not verify his identity. (*Id.* at 55). Mr. Vasquez was not working at the time, but had worked in the area. (*Id.* at 49, 76).

The defense's motion to dismiss at the close of evidence was denied. (Vol. II Trial RP 116-120). No objections or exceptions were taken to the court's instructions. (*Id.* at 114, 115).

The jury found Mr. Vasquez guilty of two counts of forgery. This appeal follows. (CP 86).

III. ARGUMENT

A. The State's evidence was insufficient to support the forgery convictions.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Vasquez had the intent to injure or defraud. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

RCW 9A.60.020(1)(b) provides in relevant part:

A person is guilty of forgery if, with intent to injure or defraud: . . .

(b) He possesses, utters, offers, . . . or puts off as true a written instrument which he knows to be forged.

A written instrument is defined to include any paper or document containing written or printed matter. RCW 9A.60.010(1).

Mr. Vasquez did not dispute he possessed the social security and resident alien cards. (Vol. II Trial RP 144). He also

did not dispute he knew they were false. (*Id.* at 145). But he did contest the element that he intended to injure or defraud. (*Id.* at 146-152).

State v. Esquivel, 71 Wn. App. 868, 863 P.2d 113 (1993), is instructive. The issue was “whether the use of a falsified government document in response to a police request for identification constitutes forgery under RCW 9A.60.020(1)(b).” Stopped by a Washington State Patrol trooper, Ramiro M. Esquivel, the driver, produced a social security card and alien registration card in response to a request for identification. *Id.* at 869. The trooper suspected the cards were not authentic. Mr. Esquivel was charged with two counts of forgery. The trial court determined as a matter of law that the State could not prove intent to defraud and dismissed the charges. *Id.* The Court of Appeals reversed.

As to the element of intent to defraud, the *Esquivel* court stated at 871-72:

The trial court appeared to base its decisions on the State’s inability to prove intent to defraud. However, intent to commit a crime may be inferred from surrounding facts and circumstances if they “plainly indicate such an intent as a matter of logical probability.” . . .

Here, the false instruments contained the names of defendants. In the case of the registration cards, their

photographs and signatures appeared on them. As a matter of logical probability, intent to defraud could be inferred from such facts and circumstances. . . . Indeed, the instruments' only value would be to falsely represent the defendants' right to legally be in this country. By showing the cards to the officers, they misrepresented their legal status, even though they did not misrepresent their legal names and other details about them. Their intent to defraud the specific officers is not required. . . . (footnotes and cites omitted).

The critical difference is that in *Esquivel*, the defendant produced the false documents when asked for identification and showed them to the trooper. This affirmative act was certainly sufficient evidence to show an intent to defraud. Here, however, Mr. Vasquez neither produced nor displayed the social security and resident alien cards in response to store security's request for identification. Indeed, they were found only after Mr. Englund searched him. The false cards were in his possession, but nothing more. Possession alone is insufficient to prove the crime of forgery. RCW 9A.60.020(1)(b); *Esquivel*, 71 Wn. App. at 870

Mr. Vasquez was not working at the time of the incident. Although he had apparently worked in the area before, the State produced no evidence to show the nature of any such work, for whom he had worked, and whether the false cards had anything whatsoever to do with obtaining work. The existence of facts

cannot be based on guess, speculation, or conjecture by the fact finder. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Yet, that is exactly what the jury improperly did in laying the foundation of surrounding facts and circumstances to infer the purported intent to defraud. But even so, those facts and circumstances must clearly show such intent as a matter of logical probability. *Esquivel*, 71 Wn. App. at 871.

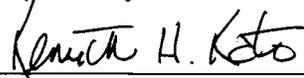
Mr. Vasquez's intent to defraud does not flow as a matter of logical probability from his mere possession of the false cards. Possession alone does not prove forgery. Because the State failed to prove intent to defraud, the forgery convictions must be reversed. RCW 9A.60.020(1)(b).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Vasquez respectfully urges this Court to reverse his convictions and dismiss the charges.

DATED this 17th day of May, 2011.

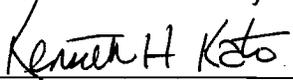
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on May 17, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Vianney Vasquez, 437 Townsite Dr., Vista, CA 92084, and electronically, as agreed between counsel, on David B. Trefry, Special Deputy Prosecuting Attorney for Yakima County.



Kenneth H. Kato