

FILED

DEC 05 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 300331

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD TERRY,

Appellant.

APPEAL FROM SUPERIOR COURT OF THE STATE OF
WASHINGTON IN AND FOR COLUMBIA COUNTY

Honorable William D. Acey

RESPONDENT'S RESPONSIVE BRIEF

Rea L. Culwell, Prosecuting Attorney
June L. Riley,
Deputy Prosecuting Attorney
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Dayton, WA 99328
509-382-1197

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**WASHINGTON STATE PATTERN CRIMINAL JURY
INSTRUCTIONS**

WPIC 130.116

WPIC 10.026

I. COUNTER STATEMENT TO ASSIGNMENTS OF ERROR

- A. Sufficient evidence exists to sustain Appellant's convictions for forgery and theft in the third degree.
- B. Trial court did not error in accepting the State's calculation of Appellant's offender score.

II. COUNTER STATEMENT OF THE CASE

Ms. Peggy Lusk shared a bank account with her father William Waltermire to assist him in paying his bills. (RP Volume G at page 200-201). Mr. Waltermire was elderly and could not see well enough to write out checks. (RP Volume G at page 200-201). They would sit down together once a month and go over Mr. Waltermire's finances. (RP Volume G at page 200-201). The table in Mr. Waltermire's dining room was used as their desk and was where they kept the checkbooks. (RP Volume G at page 200-201).

On December 24, 2010, Ms. Lusk received a phone call from Bank of America asking her if she had written a check for \$500.00. (RP Volume G at page 202). She asked when the check had been written and they told her the day before; December 23, 2010. (RP Volume G at page 202). Ms. Lusk told Bank of America that she had not written such a check and they advised her to come to the bank and close the account. (RP Volume G at page 202). Ms. Lusk went to the bank, closed the account and then went to Dayton to her father's house to tell him what happened and find out

how her father wanted to handle the matter. (RP Volume G at page 202). Mr. Waltermire asked her to report the matter to the Sheriff Department. (RP Volume G at page 202-203). When Ms. Lusk was at her father's house she looked at the check books and realized that a check was missing. (RP Volume G at page 204). Ms. Lusk was provided a copy of the cashed check from the bank. (RP Volume G at page 203).

Ms. Lusk went to the Columbia County Sheriff Department and was assisted by Deputy Ferguson, who took a report of the incident. (RP Volume G at page 203). Ms. Lusk reported that a check had been forged and that \$500.00 was missing from her father's account. (RP Volume G at page 188). Deputy Ferguson conducted an investigation and obtained a search warrant. (RP Volume G at page 191). Deputy Ferguson received a video from the bank; which showed a teller cashing the check at the request of Appellant. (RP Volume G at page 192). Deputy Ferguson identified Appellant from the video as the person who cashed the check.

The teller who cashed the check was Bobbi Rittenhouse. (RP Volume G at page 192). Ms. Rittenhouse testified that Appellant cashed the check. (RP Volume G at page 173). The check was written out to "Cash" in the amount of \$500.00 with the name "Eddie Terry" in the memo line and was dated "12-23-10". (RP Volume G at page 175). Ms. Rittenhouse recognized her handwriting on the back of the check where she wrote out Appellant's driver's license number. (RP Volume G at page 176). Ms. Rittenhouse wrote the driver's license number on the back of

the check because Appellant did not have an account at the bank. (RP Volume G at page 177). She obtained the driver's license number directly from Appellant's driver's license. (RP Volume G at page 178). The back of the check also contained Appellant's signature. (RP Volume G at page 176). Ms. Rittenhouse gave Appellant \$500.00 for cashing the check. (RP Volume G at page 180).

Ms. Lusk did not sign the check which Appellant cashed. (RP Volume G at page 209). Ms. Lusk did not give the check to anyone. (RP Volume G at page 209-210). Ms. Lusk did not give the check to Appellant. (RP Volume G at page 210). Neither Ms. Lusk nor Mr. Waltermire owed Appellant any money. (RP Volume G at page 210). Appellant has never performed any services for Mr. Waltermire or Ms. Lusk. (RP Volume G at page 210). Mr. Waltermire did not give the check to Appellant. (RP Volume G at page 200-201).

Appellant was a distant relative of Ms. Lusk and had access to Mr. Waltermire's house. (RP Volume G at page 206, 211).

III. ARGUMENT

A review of sufficiency of evidence requires that the evidence be viewed in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 220-222, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the evidence presented at trial. *State v. Kintz*, 169 Wash.2d 537, 551, 238 P.3d 470 (2010). All reasonable

inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wash.2d 899, 906-907, 567 P.2d 1136 (1977). The inferences drawn from the evidence must be interpreted most strongly against defendant. *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). The appellate court should defer to the fact finder on the persuasiveness of the evidence, conflicting testimony and credibility of witnesses. *State v. Thomas*, 150 Wash. 2d 821, 874-875, 83 P.3d 970 (2004). Circumstantial evidence and direct evidence are equally reliable. *State v. Kintz*, 169 Wash.2d 537, 551, 238 P.3d 470 (2010).

A. SUFFICIENT EVIDENCE OF FORGERY WAS PRESENTED.

The elements to convict Appellant of forgery are as follows:

To convict the defendant of the crime of forgery, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 23, 2010, the defendant 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 this act occurred in the State of Washington.

WPIC 130.03

Sufficient evidence existed to satisfy the first element as follows:

Element (1) The act occurred on December 23, 2010 the defendant put off as true a written instrument which had been falsely made, completed or altered;

December 23, 2010:

Ms. Rittenhouse testified that the video showing the Appellant cashing the check was filmed on December 23, 2010; the day Appellant cashed the check. (RP Volume G at page 172; 11-18).

Appellant “put off” the check:

(a) Appellant was identified by the teller as the person who cashed the check, (RP Volume G at page 173). (b) Appellant signed the back of the check (RP Volume G at page 176). (c) Appellant’s name was written in the “memo” portion of the check. (RP Volume G at page 175). (d) Appellant gave the teller his driver’s license for identification. (RP Volume G at page 178).

The check was “put off” as true written instrument:

By presenting the check to Bank of America and obtaining cash, Appellant “put off” the check as a true written instrument. The evidence of Appellant cashing the check is detailed in the preceding section. The only reasonable inference of the Appellant cashing the check is that he was “putting off” the check as a true written instrument. No other inference can be drawn from the Appellant’s action of presenting the check for cashing.

Which had been falsely made, completed or altered:

The check was falsely made, completed or altered. Ms. Lusk did not sign the check. (RP Volume G at page 209). Ms. Lusk did not give the check to anyone. (RP Volume G at page 209-210). Ms. Lusk did not give

the check to Appellant. (RP Volume G at page 210). Mr. Waltermire did not give the check to Appellant. (RP Volume G at page 200-201). Since the check was not made, issued or signed by the account holders, the check was falsely made. A document made or completed without the authority of anyone entitled to grant such authority is a forged document. *WPIC 130.11.*

Element (2) That the defendant knew that the instrument had been falsely made, completed, or altered;

Appellant's knowledge that the check had been falsely made, completed or altered is properly inferred from the evidence:

Knowledge can be inferred in several different ways:

- a) The person is aware of a fact or circumstance; they have knowledge of that fact or circumstance;
- b) The person has information that would lead a reasonable person in the same situation to believe that a fact exists;
- c) The person acts intentionally, which means they act with the objective or purpose of accomplishing a result that constitutes a crime.

WPIC 10.02

Ms. Lusk did not give the check to Appellant. (RP Volume G at page 210). Mr. Waltermire did not give the check to Appellant. (RP Volume G at page 200-201). The only inference is that Appellant knew the check was not given to him by the owners of the account. No evidence

was presented that Appellant had any reason to believe his possession of the check was authorized.

Neither Ms. Lusk nor Mr. Waltermire owed Appellant any money. (RP Volume G at page 210). Appellant has never performed any services for Mr. Waltermire or Ms. Lusk. (RP Volume G at page 210). The only reasonable inference is that Appellant knew that the check was not given to him for any obligation owed to him by the owners of the account.

Knowledge under Prong (a):

The only reasonable inference is that Appellant was aware that the check did not come from the owners of the account, since they did not give the check to him. Appellant was also aware that the owners of the account had no obligation to pay him any money.

Knowledge under Prong (b):

Any reasonable person who knew they were not owed money and who took / received a check made payable to cash from someone other than the owner of the account would believe that the check was NOT a genuine, authorized and valid check.

Knowledge under Prong (c):

Sufficient evidence exists that Appellant acted with the objective or purpose of taking the check he was not entitled to cashing the check and taking the money. Since Appellant acted intentionally to cash a forged check, Appellant acted with knowledge.

The unexplained possession and uttering of a forged instrument... raises an inference, or a rebuttable

presumption, is strong evidence or is evidence, or makes out a prima facie case of guilt of forgery of the possessor. (Footnotes omitted.)

State v. Esquivel, 71 Wash.App. 868, 871, 863 P.2d 113 (1993).

Only one inference is reasonable and logical, Appellant had knowledge that the check was forged.

Element (3) That the defendant acted with intent to injure or defraud;

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”. *State v. Esquivel*, 71 Wash.App. 868, 871, 863 P.2d 113 (1993). Appellant’s intent to injure or defraud is the only reasonable inference. The only evidence presented was that the account owners did not give the check to Appellant and owed him no money. Appellant used the forged check to steal five hundred dollars. Appellant injured Mr. Waltermire and Ms. Lusk and defrauded the bank.

Element (4) That this act occurred in the State of Washington.

The evidence presented was that Mr. Waltermire resided in Dayton, Washington State and that the check was cashed in Walla Walla, Washington State. (RP volume G at page 164) It is undisputed that this element was satisfied.

More than “Slight Corroborating Evidence” exists:

Appellant’s use of *State v. Soby*, 117 Wash.2d 55, 810 P.2d 1358 (1991) is misplaced. The defendant in *Soby* was convicted of forgery and appealed based upon a claim of insufficient evidence. The defendant

passed a one dollar bill that had the corners of a twenty dollar bill taped to the corners of the one dollar bill. He claimed that he did not know. The court held that possession alone was not enough without some slight corroborating evidence of knowledge. The obvious alteration and the twenty dollar bill in defendant's pocket with the corners torn off was sufficient.

Appellant's reliance on this case is flawed. Cash is completely different from a check. Cash is an anonymous form of currency, there is no indication on the face of cash as to who the previous owner was or why the cash is in the possession of the current holder. A check has on its face the names and address of the account owner. The holder of the check would know the identity of the owner of the funds backing the check. If the holder did not receive the check from the owner of the account and has no right to receive money from the account owner the only reasonable inference is that the holder knew they were not entitled to the check or the money.

The fact that Appellant knew he did not receive the check from the account owner and knew that he was not owed any money from the account owner is sufficient to corroborate Appellant's possession of the check with knowledge that the check was forged. A claim of insufficiency admits the truth of the evidence presented at trial. *State v. Kintz*, 169 Wash.2d 537, 551, 238 P.3d 470 (2010). There can be no dispute that

Appellant was not entitled to the check or money and no evidence to support such an argument exists.

The possibilities raised by Appellant are irrelevant. The evidence presented at trial was sufficient, any possibilities raised on appeal as to what might have happened have no bearing on whether the evidence at trial was sufficient. Appellant's argument is specious and fails.

B. SUFFICIENT EVIDENCE OF THEFT 3RD DEGREE WAS PRESENTED

The elements for conviction on a charge of Theft 3rd degree are set forth in WPIC 70.11; the jury was properly instructed:

To convict the defendant of the crime of theft in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about December 23, 2010, the defendant wrongfully obtained or exerted unauthorized control over property of another not exceeding \$750.00 in value;
- 2) That the defendant intended to deprive the other person of the property;
- 3) That this act occurred in the State of Washington.

Element (1) that on or about December 23, 2010, the defendant wrongfully obtained or exerted unauthorized control over property of another not exceeding \$750.00 in value.

December 23, 2010:

As set forth above, the check was cashed on December 23, 2010 and \$500.00 was given to Appellant from the bank account of Mr. Waltermire and Ms. Lusk.

The defendant wrongfully obtained or exerted unauthorized control over property of another not exceeding \$750.00 in value:

As Ms. Lusk testified, Appellant was not given the check by her or Mr. Waltermire and had no authority to have the check or the cash from the check. (RP Volume G at pages 200-210). There is no evidence that Appellant was authorized to have the check or the \$500.00. Appellant exerted control over the check by having possession of the check and cashing the check. Since Appellant was not authorized to have the check which he cashed, he exerted unauthorized control over the check and the \$500.00.

Element (2) That the defendant intended to deprive the other person of the property.

The only reasonable inference to be made from Appellant taking the check to the bank, cashing it and taking the money is that he intended to and, in fact did, deprive Ms. Lusk and Mr. Waltermire of the money.

Element (3) That this act occurred in the State of Washington.

The evidence presented was that Mr. Waltermire resided in Dayton, Washington State and that the check was cashed in Walla Walla, Washington State. (RP Volume G at page 164) It is undisputed that this element was satisfied.

**C. RESENTENCING IS NOT REQUIRED AS NO ERROR
OCCURRED OR WOULD BE HARMLESS**

State v. Hunley, 161 Wash.App. 919, 253 P.3d 448 (2011), is not controlling authority. The Division II case has been accepted for review by the Washington State Supreme Court and should not control herein. *State v. Hunley*, 172 Wash.2d 1014, 262 P.3d 63 (September 23, 2011).

The court in *Hunley* held that a criminal history summary which includes sufficient evidence of prior convictions does not violate Due Process and is prima facie evidence of criminal history. (*at page* 929). In this matter, Appellant's criminal history was detailed in the Judgment and Sentence, the crime, dates of incident and conviction were detailed. The Judgment and Sentence included the fact that all prior convictions occurred in Columbia County. (CP 74). The detailed information contained in the Judgment and Sentence should satisfy as prima facie evidence of Appellant's criminal history.

Appellant acknowledged his criminal history when he reviewed and signed the Judgment and Sentence. (RP Volume I at 276) and (CP 74). Appellant's signature is an acknowledgment. *State v. Badger*, 64 Wash.App. 904, 906, 827 P.2d 318 (1992).

Appellant has failed to allege that any error occurred in the sentence imposed. Resentencing would have no different outcome. Appellant has not alleged that the calculation of the offender score of 6 is incorrect. To require resentencing based upon Appellant's criminal history

which he acknowledged as correct by signing the Judgment and Sentence would be moot.

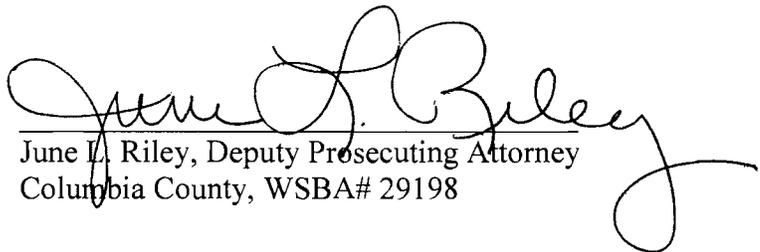
Remand for resentencing should take place when a defendant has been erroneously sentenced. *State v. Ford*, 137 Wash.2d 472, 973 P.2d 1369 (1993).

Where the standard sentencing range is the same based on the offender score calculation, the error is harmless. *State v. Priest*, 147 Wash.App. 662, 196 P.3d 763 (2008). The same logic applies herein. Appellant has not alleged that his offender score is incorrect. Thus, even if this matter is remanded for resentencing the sentence would remain the same.

IV. CONCLUSION

For the foregoing reasons, it is respectfully requested that this appeal be dismissed.

Date: Dec 1, 2011


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