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NO. 87282-1

RECEIVED BY E-MAIL

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VIANNEY VASQUEZ,

Petitioner.

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

PETITIONER'S ANSWER TO AMICUS BRIEF
FILED BY WASHINGTON ASSOCIATION OF PROSECUTING
ATTORNEYS

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

 ORIGINAL

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A. INTRODUCTION.

Vianney Vasquez was 18 years old when a Safeway security guard stopped him for using the store's lotion without purchasing it, questioned him, and found two false identification cards inside his wallet. Vasquez was unemployed at the time and never indicated that he planned on or had used the false documents to defraud an employer, just as he did not try to deceive the security guard. By taking the record evidence out of context and misrepresenting the issues in an effort to erroneously portray Vasquez's arguments, the amicus brief filed by the Washington Association of Prosecuting Attorneys (WAPA) is largely incorrect in its assessment of the evidence required to commit forgery. To the extent the amicus brief agrees that possessing forged identification cards is not enough to demonstrate the intent to defraud another required to commit forgery, Vasquez endorses this position.

B. ARGUMENT.

1. **WAPA ignores the temporal requirement that the intent to commit the crime must be related to the act underlying the crime.**

Vasquez was charged with forgery based on his actions "on or about July 28, 2010" against "Security Guard Timothy Englund." CP 6 (original information); CP 22 (final amended information). The record

evidence showed that on or about July 28, 2010, Vasquez told security guard Englund his true name and did not offer false documents as proof of his identity. 2RP 44, 47-48, 67. Vasquez did not try to misrepresent his identity or deceive the security guard.

The charging document sets the parameters of the offense that may be prosecuted. See State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (in charging document, defendant must be “apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime”). Likewise, the “to convict” instructions define the essential elements of a charged crime for the jury and constitute the law of the case. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (“to convict instruction” “carries with it a special weight because the jury treats the instruction as a ‘yardstick’ by which to measure a defendant's guilt or innocence”); see also State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (“the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction”). The “to convict” instructions required the prosecution to establish beyond a reasonable doubt that Vasquez knowingly “possessed, offered or put off as true,” the false documents

while acting with the intent to defraud “on or about July 28, 2010.” CP 58, 62.

WAPA’s amicus brief is premised on the notion that Vasquez must have harbored the intent to misrepresent his legal status at some other time by having false identification cards in his wallet, because a wallet is a special, safe place for identification. WAPA brief, at 7.¹ WAPA never acknowledges the lack of evidence presented proving Vasquez’s intent to defraud on or about July 28, 2010. He did not lie to Englund. He was not employed at the time and consequently could not have been deceiving and defrauding an employer at that time. 2RP 74, 76. He was 18 years old, 2RP 96, and WAPA irrationally speculates he could have had a significant work history at this age predicated on use of these false identification documents.

WAPA also unreasonably insists that Englund’s claim that Vasquez said he had previously “worked in the area” supplies the necessary evidence of Vasquez’s intent to defraud. 2RP 49. Yet there was no connection between any such employment and the cards in

Vasquez's wallet. Id. There was no testimony that Vasquez had these cards when he had previously worked in the area. There was no evidence about the kind of work Vasquez did as a teenager -- he may have worked as a babysitter, lawn mower, or dog walker without being asked to provide a social security number.

It is also unreasonable to treat Englund's interpretation of Vasquez's words as if they meant more than what the State elicited. Englund used a co-worker from the grocery store to interpret the "trespass admonishment" portion of his conversation with Vasquez because Vasquez did not "track" all the English phrases being used. 2RP 78. Vasquez's statement that he had worked in the area cannot be construed to mean more than that plain statement.

Vasquez's intent to defraud the security guard at the identified point in time was not only an essential element of the charge, the temporal connection is critical to the question of what rational inference may be drawn by the jury. As the Sixth Circuit explained when addressing the sufficiency of circumstantial evidence in a homicide

¹ WAPA incorrectly asserts that these two identification cards were the only pieces of identification in Vasquez's wallet. WAPA brief at 7. Englund testified there "could have been" other cards, such as a school identification

case, a witness's claim that the accused had a gun would present a "stronger inference" if that observation occurred jury one day before the homicide. Newman v. Metrish, 543 F.3d 793, 797 & n.4 (6th Cir. 2008). Instead, the witness saw a gun in the accused's home two weeks before the homicide. Id. at 797. The two-week gap in time between when the accused might have had a gun in his home and the shooting occurred substantially diluted the ability to draw a reasonable inference from this evidence.

Likewise, there was no evidence Vasquez was trying to use the identification cards to his advantage at or near the time of his arrest. WAPA engages in sheer speculation that having false documents proves Vasquez's intent to defraud no matter when in time that intent could arise. This theory takes the argument far afield of the inferences permitted by reason and required to prove the essential elements of the charged offense.

card, but Englund did not pay attention to or recall what else was in the wallet. 2RP 67.

2. The erroneous evaluation of the evidence in the case stems from the misapplication of the standard of review, which WAPA fails to understand.

The Court of Appeals expressly relied on a “substantial evidence” standard of review that has been rejected by the United States Supreme Court. As succinctly explained in the amicus brief jointly filed by the American Civil Liberties Union (ACLU), Washington Association of Criminal Defense Lawyers, and Washington Defender Association, this misapprehension of the law underlies the erroneous analysis conducted by the Court of Appeals. This ACLU, *et al* amicus brief debunks the flawed analytical construct of the Court of Appeals and WAPA’s brief.

Furthermore, in Jackson v. Virginia, 443 U.S. 307, 320, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the Supreme Court held that it is “simply inadequate” for the reviewing court to ask only whether there was any evidence, or even a “modicum of evidence” on an essential element. “[I]t could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” Id. The “due process command” of the constitution demands more than ensuring a “mere modicum” of evidence could support a conviction. Id. Instead, the reviewing court asks whether upon

“the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Id.* at 324.

Rational inferences may be premised on “the record evidence adduced at trial” but may not be premised on speculation. *Id.* “[A] reviewing court should not give credence to evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative.” *O’Laughlin v. O’Brien*, 568 F.3d 287, 301-02 (1st Cir. 2009) (internal citations omitted); see also *United States v. Valerio*, 48 F.3d 58, 64 (1st Cir.1995) (“we are loath to stack inference upon inference in order to uphold the jury's verdict”). Speculation is at the core of WAPA’s amicus brief.

3. As WAPA seems to agree, possession alone does not demonstrate the intent to defraud required for forgery.

The prosecution at trial and the Court of Appeals treated the “intent to defraud” as a forgone conclusion from possession of a falsified document. The Court of Appeals did not defer to the fact-finder’s rational inferences, but rather, it declared that any “unexplained” possession of false identification is per se “prima facie evidence” of intent to defraud. *State v. Vasquez*, 166 Wn.App. 50, 53, 269 P.3d 370, 371, recon. denied (Mar. 7, 2012), review granted, 174

Wn.2d 1017 (2012). This reasoning conflates forgery's separate elements of knowing possession and specific intent to defraud; creates a presumption that has never been condoned by the legislature; and treats the intent to defraud as the legal equivalent of the potential for deception notwithstanding the distinct legal meaning of the intent to defraud.

To defraud means to intend to cause loss or damage; it requires the perpetrator "deprive of some right, interest or property by deceit." United States v. Yerman, 468 U.S. 63, 73 n.12, 104 S. Ct. 2875, 97 L. Ed. 2d 292 (1987). Black's Law Dictionary explains that "intent to defraud" requires not only the intent "to deceive another person," it also requires the intent "to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property." Black's Law Dictionary (5th Ed. 1979), p. 381.

This intent is absent from the case at bar. WAPA agrees that possession alone could not constitute the intent to defraud, even though it misapprehends the evidence offered at trial and overstates the record evidence of Vasquez's intent. Because possession does not prove the intent to defraud, and Vasquez did not display an intent to induce

injurious reliance on the documents in his wallet on July 28, 2010, there was insufficient evidence as required by law.

4. Vasquez has never asked the Court to re-write the essential elements of forgery, contrary to WAPA's hyperbole.

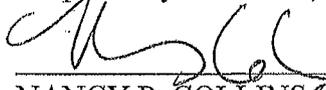
In what must be construed as hyperbole, WAPA contends that Vasquez wants this Court to alter the statutory definition of forgery. WAPA brief at 16-17. Vasquez has never argued that possession of a forged document should be stricken from the list of potential acts underlying a forgery conviction. Vasquez explains, and WAPA appears to agree, that possession alone is unlikely to be enough to prove the intent to defraud. Words and conduct would be required to show the intent to defraud. In a case where Vasquez did not try to use, offer, or even proclaim the validity of the false documents in his wallet, WAPA never explains what words or conduct by Vasquez proved his intent to defraud on or about July 28, 2010. For these reasons, there was insufficient evidence in the case at bar and the Court of Appeals impermissibly presumed Vasquez's intent to defraud from the potential for deceitfulness, absent evidence of the intent to defraud.

C. CONCLUSION.

For the foregoing reasons, Mr. Vasquez respectfully requests this Court hold that the prosecution did not present sufficient evidence to sustain a conviction for forgery.

DATED this 7th day of March 2013.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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 Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **PETITIONER'S ANSWER TO AMICUS BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|--|-------------------|-------------------------------------|
| [X] DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846 | (X) () () | U.S. MAIL HAND DELIVERY _____ |
| [X] ERIN BECKER, DPA APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104 | (X) () () | U.S. MAIL HAND DELIVERY _____ |
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| [X] SUZANNE ELLIOTT ATTORNEY AT LAW 705 2 ND AVE. STE 1300 SEATTLE, WA 98104 | (X) () () | U.S. MAIL HAND DELIVERY _____ |

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

[X] VANESSA HERNANDEZ
NANCY TALNER
SARAH DUNNE
ACLU OF WASHINGTON
901 5TH AVE. STE 630
SEATTLE, WA 98164

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] GARY MANCA
MANCA LAW PLLC
434 NE MAPLE LEAF PL APT 201
SEATTLE, WA 98115

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] MATTHEW ADAMS
NW IMMIGRANTS RIGHTS PROJECT
615 2ND AVE. STE 400
SEATTLE, WA 98104

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY MARCH, 2013.

x _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
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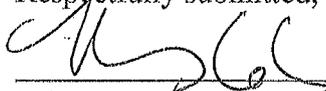
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C. CONCLUSION.

For the foregoing reasons, Mr. Vasquez respectfully requests this Court hold that the prosecution did not present sufficient evidence to sustain a conviction for forgery.

DATED this 7th day of March 2013.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Petitioner

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

[X] VANESSA HERNANDEZ
NANCY TALNER
SARAH DUNNE
ACLU OF WASHINGTON
901 5TH AVE. STE 630
SEATTLE, WA 98164

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] GARY MANCA
MANCA LAW PLLC
434 NE MAPLE LEAF PL APT 201
SEATTLE, WA 98115

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] MATTHEW ADAMS
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1511 Third Avenue
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Phone (206) 587-2711
Fax (206) 587-2710

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No. 87282-1

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Petitioner's Answer to Amicus Brief

Nancy P. Collins - WSBA #28806
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: nancy@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
www.washapp.org

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