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THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VIANNEY VASQUEZ,

ANSWER TO AMICUS MEMORANDUM BY YAKIMA COUNTY

David B. Trefry
WSBA #16050
Special Deputy Prosecuting Attorney
Yakima County Prosecutors Office
P.O. Box 4846
Spokane, WA 99220

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N 2nd Street Room 329
Yakima, WA 98901-2621

ORIGINAL

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii-iii

A. INTRODUCTION 1

B. ISSUE PRESENTED BY PETITION 1

ANSWERS TO ISSUES PRESENTED BY PETITION 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 1

E. CONCLUSION 9

APPENDIX 'A'

TABLE OF AUTHORITIES

PAGE

Cases

State v. Esquivel, 71 Wn.App. 868, 863 P.2d 113 (1993) 2, 7

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 3, 4, 5

State v. Slighte, 157 Wn.App.618, 238 P.3d 83 (2010),
modified on remand, 164 Wn.App. 717, 267 P.3d 401 (2011) 5

State v. Sweany, 162 Wn.App. 223, 256 P.3d 1230 (2011) 3, 4, 5

State v. Sweany, 86270-2 (WASC) 3

State v. Tinajero, 154 Wn.App. 745,
228 P.3d 1282 (Wash.App.Div.3 2009) 2, 7, 10

State v. Vasquez, 166 Wn.App. 50, 269 P.3d 370 (2012) 1,3-6,8

State v. Woods, 63 Wn.App.588, 821 P.2d 1235 (1991) 7

Federal Cases

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560,
99 S.Ct. 2781 (1979) 4, 5

Additional Cases

In re Leonard M., Cal.App.3d -, 160 Cal.Rprt. 631 (1979) ..... Appendix

People v. Castellanos, 110 Cal.App. 4th 1489,
2 Cal. Rptr.3d 544, 547 (Cal.Ct.App.2003) ..... Appendix

People v. Miralda, 981 P.2d 676, 679-80 (Colo.Ct.App.1999) ... Appendix

State v. Acevedo, 705 N.W.2d 1, 5 (Iowa 2005) ..... Appendix

State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992) ..... Appendix

State v. Escobedo, 404 So.2d 760, 764-65 (Fla.Dist.Ct.App. 1981) ..... Appendix
State v. Hogshooter, 640 S.W.2d 202, 204 (Mo.Ct.App. 1982).. Appendix

State v. Lores, 512 N.W.2d 618, 621 (Minn.Ct.App.1994)..... Appendix

State v. Mathias, 216 N.W.2d 319, 321 (Iowa 1974) ..... Appendix

Statutes and Rules

RCW 9 A.06.020 9

RAP 10.3 1

RAP 13.4 10

RAP 13.4(b) 1

A. INTRODUCTION

Mr. Vasquez was charged and convicted of two counts of forgery and timely appealed. The Court of Appeals Division III upheld those convictions. State v. Vasquez, 166 Wn.App. 50, 269 P.3d 370 (2012). Mr. Vasquez's motion for reconsideration was denied. This court has now accepted review.

B. ISSUE PRESENTED BY AMICUS

1) The decision conflicts with the Constitutional requirement that all elements of a crime be proven beyond a reasonable doubt
2) That the harsh consequences of the ruling will impact thousands thereby justifying review.

ANSWER TO ISSUES RAISED

1. The decision does not abrogate the constitutional requirements necessary to obtain a conviction.
2. The decision does not change the impact on persons convicted under the Forgery statute. It does not impose "harsh" consequences other than those imposed by any felony conviction.

C. STATEMENT OF THE CASE

The facts addressing what occurred in this case are set out in the Court of Appeals decision. The State shall refer to specific sections of the record but shall not set forth a separate specific fact section in this response, pursuant to RAP 10.3

D. ARGUMENT

RAP 13.4(b) Considerations Governing Acceptance of Review.

The Courts ruling does not 1) Conflict with any decision by this court, the claim by Amicus is not supported by the law or the facts of the case This

allegation is based on an interpretation that conflicts with the plain meaning of the decision; 2) The ruling does not conflict with any ruling by any other division of the Court of Appeals. See e.g. State v. Esquivel, 71 Wn. App. 868,871,863 P.2d 113 (1993) and State v. Tinajero, 154 Wn.App. 745, 228 P.3d 1282 (Wash.App. Div. 3 2009); 3) The ruling does not raise a significant question under either the State or Federal Constitution; 4) This issue does not raise an issue of substantial public interest it merely reiterates the standard of proof needed to conviction an individual of forgery based on a case opined in 1993. There may be an impact on those who carry fake documentation, however the impact will not be increased nor decreased by this ruling. The State is still required to prove all of the elements of the crime of Forgery beyond a reasonable doubt in a court of law.

A.) The Court of Appeals did not use the "substantial evidence" standard. Amicus parses the ruling of the Court of Appeals by selecting the word, "substantial," from the opinion. The Court actually stated "So the question then becomes whether, as a matter of logical probability, the jury could infer intent to defraud from Mr. Vasquez's possession of these cards, his conduct, and his exchanges with the security officer. Said another way, is the evidence of intent to defraud substantial when we consider the reasonable inferences available to the jury." (Emphasis mine.) The Court then cites

State v. Sweany, 162 Wn.App. 223, 256 P.3d 1230 (2011) a decision recently upheld by this Court – State v. Sweany, 86270-2 (WASC). State v. Sweany 162 Wn.App. at 227-8 as cited by the Court of Appeals states;

> A defendant's right to require that the State prove each essential element of a crime beyond a reasonable doubt is a due process right guaranteed under the United States Constitution. U.S. CONST. amends. V, XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Lively, 130 Wash.2d 1, 11, 921 P.2d 1035 (1996).
>
> This Court affirmed Sweany stating the following:
>
> When a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether "sufficient evidence supports each alternative means." State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010). **Though some cases refer to the required quantum of evidence as "substantial evidence, " the analysis has consistently been conducted according to the sufficiency of the evidence standard.** See, e.g., In re Det. of Halgren, 156 Wn.2d 795, 811, 132 P.3d 174 (2006); State v. Lee, 128 Wn.2d 151, 160, 164, 904 P.2d 1143 (1995). "The standard of review for a challenge to the sufficiency of the evidence" is whether, viewing the evidence "in a light most favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Randhawa, 133 Wn.2d 67, 73, 941 P.2d 661 (1997) (citation omitted) (internal quotation marks omitted) (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). (Emphasis mine.)

The first paragraph of this Courts ruling in Sweany dispels the allegation raised by Amicus. The mere use of the word "substantial" in Vasquez did not manifest intent on the part of the Court to change years of case law. The Court never used the phrase "substantial evidence" only the word "substantial." The

State did cite in its brief, State v. Stilter, 80 Wn.2d 47, 55, 491 P.2d 1043 (1971), which quotes State v Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971) these cases were cited to address the issue raised on appeal; should the trial court have "taken the case from the jury" (State's Brief at 2-3) Clearly the Court did not rely on Randecker it cited Sweany, which requires sufficiency to be evaluated using the "more rigorous" test in Jackson and Green. Division III continues to use Green; see State v. Butler, 165 Wn.App. 820, 829, 269 P.3d 315 (2012) a case reviewed by the same panel that issued Vasquez. The court in Butler actually uses the phrase "substantial evidence" and then cites Green;

> The State, of course, must produce substantial evidence to support the elements of a crime. Whether the State has met that burden, a burden of production, is a question of law that we review de novo. Id. Whether there is sufficient evidence to support a conviction turns on "'whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime].' " State v. Vladovic, 99 Wash.2d 413, 424, 662 P.2d 853 (1983) (quoting **State v. Green**, 94 Wash.2d 216, 221-22, 616 P2d 628 (1980)). (Added emphasis mine.)

Division III in State v. Villano, 166 Wn.App. 142, 144, 272 P.3d 255 (Wash.App. Div. 3 2012) stated "We review sufficiency challenges to see if there was evidence from which the trier-of-fact could find each element of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wash.2d 216, 221-222, 616 P.2d 628 (1980). We must consider the evidence in a light most favorable to the prosecution. *Id.*" Clearly Division III is adhering to Green.

The term "substantial evidence" is grounded in Green and Jackson and this was reaffirmed by this court Sweany, the use of the word substantial in Vasquez did not lower the standard of review as Amicus claims. See also State v. Kirwin, 166 Wn.App. 659, 271 P.3d 310 (2012) citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) while using the phrase "substantial evidence standard " See also State v. Slighte, 157 Wn.App. 618, 626, 238 P.3d 83 (2010), modified on remand, 164 Wn.App. 717, 267 P.3d 401 (2011), the court in Slighte also used the phrase "substantial evidence."

B.) Amicus claims no facts support the finding of intent. The record on appeal demonstrated the necessary intent, given the totality of the testimony before the trial court, as Court of Appeals stated in its opinion. The Court was not required to re-state the facts; they are contained in the verbatim report of proceedings which was obviously read by the court. Vasquez told the store officer that he had purchase the documents from California, that they were purchased through a friend for $50.00, that they were fake and that he had come up to the area and had been working in the area. (RP 50) Testimony from Special Agent Rodriquez confirmed that to gain legal employment in the United States Vasquez needed a valid social security number. (RP 98) Vasquez had in his possession forged social security and permanent resident cards. Additionally the store employee who detained Vasquez was unable to determine who Vasquez actually was based on these fake cards, he and his employer, the company from which

Vasquez had shoplifted, were intentionally defrauded by the forged documents used by Vasquez. (RP 55, 69-70) This company's policy was to "trespass" and perform a "courtesy release" if a party who had shoplifted form the store if it could be determined who the person actually was. (RP 41-2, 46-7, 54-55, 60, 68-70)

The claim that there was "scant" evidence is immaterial, the standard of proof, is not the paucity or enormity of evidence it is; was the evidence sufficient to prove beyond a reasonable doubt all of the elements of the crime. The Court's opinion stated mere possession was not enough "...the jury could infer intent to defraud from Mr. Vasquez's possession of these cards, his conduct, and his exchanges with the security officer." Said another way, is the evidence of intent to defraud substantial when we consider the reasonable inferences available to the jury..." Vasquez at 53. (Emphasis mine.)

The ruling was a not an expansion of existing law. The court clearly ruled that "Under the statute, "[a] person is guilty of forgery if, with intent to injure or defraud ... [he] *possesses,* ... a written instrument which he knows to be forged." (Emphasis in original.) Mr. Vasquez was asked if they were his cards, that he was the person on the cards, if the information contained on them was his and that information was valid. Mr. Vasquez initially tried to convince the security person that they were valid and were his. The purpose for the questions, once again, was to allow this company representative to complete the actions needed to either

trespass Vasquez from the store and/or request restitution, that could not be done without determining who Vasquez was. Obviously that could not be done using someone else's social security number. It was after Vasquez stated to the store employee that they were valid that Vasquez admitted he had actually purchased them for $50.00 from a friend in California and that "he worked in the area." This was also an attempt to injure or defraud the store. The court cited clearly settled case law "[t]he intent to commit the crime of forgery may be inferred from surrounding facts and circumstances if such intent is "'a matter of logical probability.'" State v. Esquivel, 71 Wn. App. 868,871,863 P.2d 113 (1993) (quoting State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991))." This court declined to review a very similar case State v. Tinajero, 154 Wn.App. 745, 228 P.3d 1282 (2009) review denied, 169 Wn.2d 1011, 236 P.3d 895 (Wash. 2010) Tinajero cited Esquivel extensively. The State cited Tinajero in its brief in the Court of Appeals.

HARSH CONSEQUENCES - This decision is not an expansion of the law and therefore will impact thousands of people; it does not "expand the liability for felony forgery." The "liability" has not changed, nor have the elements which must be proven. This is a fact specific decision that follows existing law. Simply put if a person does not carry forged document(s) it will impact no one. If you do carry forged documents, whether you are a citizen, legal resident or illegally in this country it will impact you identically. You can be charged and

found guilty of the crime of forgery if all elements are present and proven *beyond a reasonable doubt* as the Court required in Vasquez. Amicus states that anyone with a false instrument will now face this new threat of a felony conviction and therefor this expanded liability. Nothing could be farther from the truth. This case did nothing but indicate the jury could, based on the facts testified to; infer intent in this Forgery case. This inference was factually proven by the State along with the other evidence necessary to prove to the jury that a forgery had been committed and that it was beyond a reasonable doubt. The statement that individuals now liable for a misdemeanor are now subject to a felony is specious at best. The law has not changed. The State is still required to prove all of the elements of this crime, not just mere possession no matter how you stretch the ruling it does not say "mere possession is a felony." Once again the ruling of the Court of Appeals requires all elements be proven to support a felony conviction, Vasquez at 53-4.

This was a neutral decision based on the existing law and the facts elicited at trial. The fact that a Forgery may impact a person's immigration status was not addressed and did not need to be addressed because neither Mr. Vasquez's race nor status in this country was an issue or could even have been raised as an issue. It was address by the State to show the intent to defraud not that Mr. Vasquez was here in the State by anything but a legal manner. Could this ruling impact a person's immigration status? Most certainly, just as it could impact a

person's liberty. But that should not influence this Court's review of this case. Each and every part of the judicial system should be concerned with the impact on all aspects of a person's life that will be affected by a conviction one of those is the ability of a person to enter and remain in this country by legal. But the truth is this case does not impact any group more severely than any other. This case clearly was not started, filed, prosecuted or reviewed based race or status in this country. Mr. Vasquez, not the store official, the Deputy Prosecutor, the jury, the trial court judge, nor Division III of the Court of Appeals, Mr. Vasquez alone determined the course and conduct of his life. He chose to purchase the forged documents, he chose to go to the store and shoplift, he chose to hold as true the forged documents he possessed, he chose to work in this country using those forged documents. It was his personal choices, a choice faced by each and every person who lives and resides here, no matter what their "status" is, that resulted in his conviction based, once again, on the totality of the information testified to and proven beyond a reasonable doubt, under sworn oath at Mr. Vasquez's trial. The "more severe consequences" a person will face based on a felony conviction will not arise if a person does not have forged documents that are uttered or offered with intent to injure or defraud. RCW 9A.60.020 This ruling does not magically turn the possession of a forged or false or fake document into a felony with all of the consequences of that degree of crime. The State has not suddenly been relieved of the burden of proof, nor the need to prove the additional elements not

found in misdemeanor or gross misdemeanor crimes involving fraudulent documents.

E. CONCLUSION

This case doe not lower any burden for the State, is does not lower anything "below the constitutional floor." It merely states what was stated in Tinajero a case this court refused to review in 2009 just as this court should refuse to review this matter now. The possibility or the probability that more people who are in this country "illegally" may also carry fake or forged documents should have no bearing on this case. This case does not have more impact on a non-citizen than it does to a citizen. This case does not broaden the law in any manner or means. Petitioner has failed to set forth any basis for this case to be reviewed by this court. His claims do not meet RAP 13.4. The actions of the trial court and the Court of Appeals both in the published opinion and the denial of the motion for reconsideration should be upheld, the actions of the Court of Appeals should not be disturbed.

Respectfully submitted this 31st day of August 2012.

s/ David B. Trefry
David B. Trefry WSBA 16050
Special Deputy Prosecuting Attorney
Attorney for Yakima County
P.O. Box 4846, Spokane, WA
Telephone: (509)-534-3505
Fax: (509)-534-3505
TrefryLaw@wegowireless.com

APPENDIX A

Because specific intent is seldom capable of direct proof, it may be shown by circumstantial evidence and the reasonable inferences drawn from that evidence. State v. Casady, 491 N.W.2d *782, 787* (Iowa 1992) (citations omitted) See also State v. Acevedo, 705 N.W.2d 1, 5 (Iowa 2005). Intent to defraud may properly be inferred from circumstances, words, and actions shown in evidence. State v. Mathias, 216 N.W.2d 319, 321 (Iowa 1974); see also People v. Castellanos, 110 Cal. App. 4th 1489, 2 Cal. Rptr. 3d 544, 547 (Cal. Ct. App. 2003) (defendant's possession of a false legal permanent resident card sufficient to evidence an intent to defraud); People v. Miralda, 981 P.2d 676, 679-80 (Colo. Ct. App. 1999) (defendant's possession of a forged INS card not sufficient to evidence an intent to defraud where the prosecution presented no proof that the defendant was not a legal resident and where the card contained accurate information respecting the defendant's identity); State v. Escobedo, 404 So.2d 760, 764-65 (Fla. Dist. Ct. App. 1981) (holding intent to defraud could be inferred from creating false birth certificates); State v. Hogshooter, 640 S.W.2d 202, 204 (Mo. Ct. App. 1982) (holding an intent to defraud could be inferred from the act of forgery or transferring the forged instrument); *c.f.* State v. Lores, 512 N.W.2d 618, 621 (Minn. Ct. App. 1994) (where statute requires an intent to utter, possession alone is insufficient).

Certificate of Service

I, David B. Trefry, hereby certify that on this date I served copies, by email, by agreement of the parties as follows:

Nancy P. Collins
Washington Appellate Project
administrator@washapp.org

Nancy L. Talner, WSBA #11196
Vanessa T. Hernandez, WSBA # 42770
ACLU of Washington Foundation
dunne@aclu-wa.org
talner@aclu-wa.org
vhernandez@aclu-wa.org

Gary Manca, WSBA # 42978
Cooperating Attorney for ACLU of
Washington Foundation
Manca Law PLLC
gm@manca-law.com

Matt Adams, WSBA #28287
Northwest Immigrant Rights Project
matt@nwirp.org

Suzanne Elliott, WSBA #12634
Washington Association of Criminal Defense Lawyers,
suzanne-elliott@msn.com

Travis Stearns, WSBA #29335
Washington Defender Association
stearns@defensenet.org

Dated at Spokane, WA this 31st day of August, 2012

s/ David B. Trefry
David B. Trefry WSBA 16050
Special Deputy Prosecuting Attorney
Attorney for Yakima County
P.O. Box 4846, Spokane, WA
Telephone: (509)-534-3505
Fax: (509)-534-3505
TrefryLaw@wegowireless.com

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Please find attached the States Answer to the Amicus Petition.

David B. Trefry
Special Deputy Prosecuting Attorney
Yakima County