

FILED

JUL 20 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 295401

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

VIANNEY VASQUEZ,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

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

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error – The evidence presented by the State was insufficient to support the conviction.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The evidence presented supported the jury's decision; the trial court correctly denied the motion to dismiss at the end of the State's case.

II. STATEMENT OF FACTS

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.

Officer Timothy Englund was working store security a Safeway the City of Yakima. (RP 40, 42). He contacted Vasquez after observing him pick up hand lotion and use some on his person. (RP 43).

Englund subsequently contacted Vasquez and identifying himself as store security. (RP 43). Vasquez was taken to a separate area of the store where the officer interviewed Vasquez and filled out paperwork regarding the shoplifting. (RP 44,59-60). Mr. Englund found Mr. Vasquez's wallet and inside there was a social security card and a permanent resident card. (RP 45-46) Mr. Vasquez said he got the social security card and permanent resident card for \$50 each from a friend in

California. (RP 47). Mr. Vasquez said they were his and were fake. (*Id.* at 55). They had his real name, Vianney Vasquez, on them. Officer Englund was going to do a courtesy release of Mr. Vasquez with a trespass letter, but called police because he could not verify his identity. (RP 55,59 69). Vasquez told Englund that he was up working in the area. (RP 49, 76).

The defense made a motion to dismiss at the close of the State's case, the court denied that request. (RP 116-120). Mr. Vasquez was found guilty, as charged, of two counts of forgery. This appeal follows. (CP 86, RP 166).

III. STATEMENT OF PROCEDURE

Mr. Vasquez was charged with two counts of unlawful possession of fictitious identification, under Yakima County Superior Court cause number 10-1-01246-5. (CP 22)

At the conclusion of the State's case, Vasquez moved to dismiss, arguing that the State could not meet its burden as a matter of law. After an extended colloquy, the court denied the motion. (RP 116-120) The jury convicted Vasquez as charged. (CP 86) (RP 165-66)

IV. STANDARD OF REVIEW

After a jury verdict has been rendered, a trial court may only determine whether there was "substantial evidence" tending to support all

the necessary elements of the crime. If substantial evidence has been presented to prove the existence of each element of the offense, as a matter of law, the court is without discretion to take the case from the jury. State v. Stilter, 80 Wn.2d 47, 55, 491 P.2d 1043 (1971), *quoting* State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971). State v. Basford, 76 Wn.2d 522, 530, 457 P.2d 1010 (1969).

V. ARGUMENT

A. There was substantial evidence to support the verdict.

RCW 9A.60.020, the forgery statute, provides, in relevant part, that a person commits forgery when he or she utters or offers a false written instrument, with “intent to injure or defraud”.

The trial court was correct, as a matter of law, when it concluded that the State’s case supported a prima facie case. State v. Esquivel, 71 Wn. App. 868, 863 P.2d 113 (1993) is on point and dispositive of the issues presented here. There, the Court of Appeals overturned a trial court’s determination that the State could not prove intent to defraud, when the defendant presented identification, when requested by law enforcement, which contained correct identifying information, but was not authentic. Id., at 869-70.

The appellate court observed that intent to commit a crime can be inferred from surrounding facts and circumstances if they “plainly indicate such an intent as a matter of logical probability”, and the intent to defraud the police officers was not required. Id., at 871-72, (citations omitted).

Also, “[t]he 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.” Wharton on Criminal Evidence, sec. 81, at 265-66 (14th ed. 1985), *quoted by Esquivel*, 71 Wn. App. at 871.

Further, as was stated in the recently decided case State v. Tinajero, 154 Wn.App. 745, 749, 228 P.3d 1282 (Div. 3 2009) “[w]ith regard to the intent to defraud, it is sufficient “if an intent appears to defraud any person, association or body politic or corporate whatsoever.” RCW 10.58.040.” Tinajero cites extensively to Esquivel. Here, there was a reasonable inference that Mr. Vasquez intended to defraud any employers by the use of false instruments, with a false name, to obtain employment with those companies.

Mr. Englund testified that Vasquez acknowledged these two forms of identification were his and they were “fake.”

Q. (By Ms. Ritchie) When you first took the cards out of the wallet and thought that they were his ID, did the defendant make any comments about those ID?

A. Other than me asking if this is his identity. Once I pull something out of a wallet, I always ask if it's their identity or their social security card.

Q. And what did he respond?

A. He said, yes.

Q. Did he ever state why he had the cards? A. After talking to him and getting that they were fake and everything, he started giving me a background story how he came from California to Yakima, staying with either friends or family. I can't remember. That he was working up here." (RP 50)

The State also elicited testimony from Special Agent Rodriguez as follows "Q. (By Ms. Ritchie) Mr. Rodriguez, in order to gain legal employment in the United States, do you need a valid social security number? A. Yes, you do." (RP 98)

Once again quoting from Tinajero:

In analyzing the trial court's decision to vacate a jury verdict, a trial court " may only determine whether there was ' substantial evidence' tending to support all necessary elements of the crime." *State v. Stiltner*, 80 Wash.2d 47, 55, 491 P.2d 1043 (1971). " ' [W]hether the evidence is sufficient to submit the issue to the jury is a question of law for the court and no element of discretion is involved.' " *State v. Basford*, 76 Wash.2d 522, 530, 457 P.2d 1010 (1969) (quoting *State v. Zorich*, 72 Wash.2d 31, 34, 431 P.2d 584 (1967)). The trial court " must assume the truth of the state's evidence and view it most strongly against the defendant and in a light most favorable to the state." *State v. Randecker*, 79 Wash.2d 512, 517, 487 P.2d 1295 (1971). In addition:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its

aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict. *Id.* at 517-18, 487 P.2d 1295.

Notably, "it is unnecessary for the court to be satisfied of the defendant's guilt beyond a reasonable doubt." *Id.* at 518, 487 P.2d 1295. It is only necessary for the court to be "satisfied that there is 'substantial evidence' to support either the state's case, or the particular element in question." *Id.* And the court must view the evidence in the light most favorable to the State. Here, we conclude that the State presented substantial evidence to support the jury's determination. (*Id.* at 750-51)

The defendant himself indicted to Officer Englund that he had obtained the false documents and that he had come to this area to work. The only means to "legally" obtain employment, according to Special Agent Rodriguez, is to have the two forms of identification that Vasquez had illegally obtained in California. (RP 49, 54) Thus any employer would in fact, be deprived of the knowledge of the true identity of its employee, the intent to injure or defraud need not have been specific to an employer. Substantial evidence supported submitting this case to the jury, that occurred and the court ruled that there evidence supported the actions of the jury.

The trial court decision covers nearly four pages of the trial transcript. The court specifically addresses Esquivel. The court discussed the fact that in this case there was not an actual presentation of

the cards to some entity. However once again citing to Tinajero quoting from Esquivel;

On appeal, the court stated that "although possession alone is insufficient to prove guilty knowledge, possession together with slight corroborating evidence may be." *Esquivel*, 71 Wash.App. at 870, 863 P.2d 113. The court also determined that " 'the unexplained possession and uttering of a forged instrument ... is strong evidence or is evidence, or makes out a prima facie case of guilt of forgery of the possessor.' " *Id.* at 871, 863 P.2d 113 (quoting 1 C. TORCIA, WHARTON ON CRIMINAL EVIDENCE § 81, at 265-66 (14th ed. 1985)). The court concluded that the trial court erred by dismissing the cases because, " [b]y showing the cards to the officers, [the defendants] misrepresented their legal status, even though they did not misrepresent their legal names and other details about them." *Id.* at 872, 863 P.2d 113. (Tinajero at 749-50)

As noted above, a trial court may only vacate a jury verdict if it finds that substantial evidence does not support all the necessary elements of the crime. Stiltner, 80 Wn.2d at 55. The court must assume the truth of the State's evidence, viewed most strongly against the defendant. If the evidence is sufficient, as a matter of law, "no element of discretion is involved." Basford, 76 Wn.2d at 530.

Setting aside a verdict is not justified if the court simply concludes that the evidence is not convincing, or may negate guilt, and "it is

unnecessary for the court to be satisfied of the defendant's guilt beyond a reasonable doubt." Randecker, 79 Wn.2d 517-18.

Here, the trial court acted in accordance with Basford and the other cases cited;

The defendants assign error to the court's refusal to dismiss or grant arrest of judgment or a new trial because of insufficiency of the evidence. This assignment appears untenable, because, as the summary of evidence shows, there was substantial evidence, and reasonable inferences to be derived therefrom, to take the case to the jury. It is the jury and not the court which decides questions of fact. If substantial evidence from a competent source has been presented to prove the existence of each element of the offense and the accused's commission of it, then the court is without discretion to take the case from the jury. In evaluating whether the evidence is substantial, the court must, as we said in State v. Zorich, 72 Wash.2d 31, 431 P.2d 584 (1967), view the evidence 'most strongly against the moving party and in the light most favorable to the opposing party, and whether the evidence is sufficient to submit the issue to the jury is a question of law for the court and no element of discretion is involved.' State v. McDonald, 74 Wash.Dec.2d 142, 443 P.2d 651 (1968).

In this factual situation there is the additional intent to defraud that is addressed by the Officer Englund. He is required to ascertain the true identity of the party he is detaining in order that his company or the company for whom he works can take proper legal action. In this instance

it was the shoplifting charge and the trespass from the store. As the officer clearly points out:

Q. So part of the process is obtaining their identification, correct?

A. Correct.

Q. And why is that important to obtain?

A. If we do get an individual come in and use a false name or address or gives us a bad address, the paperwork is forwarded on to them through the police department. They get a ticket for third degree theft if the store decides to prosecute. If not, no matter what, if you were caught shoplifting, Safeway sends you a letter in the mail. It's called a restitution letter. They charge you up to \$250 plus the price of the merchandise. So if it doesn't get to them, then they can actually pursue charges. If they don't respond to a ticket in the mail from the police department, then a warrant for their arrest could be issued.

Q. So if a shoplifter just gave you their name and address, would you just take that and write that down and that would be sufficient for you?

A. No. It has to be state or federal ID, government-issued ID, no Costco cards with pictures on the back of them. It has to be a driver's license, ID card, anything that is government issued.

(RP 41-2)

...

I started asking him -- one of the things we put on our report is the social security number. He couldn't tell me the social security number back at me. I compared it actually to my social security card as well as his social security card. **It's important that we do because on the paperwork that gets forwarded onto the police department, if it is a social security number that doesn't belong to him, then that person will get reprimanded for theft. That's what we try to avoid with the paperwork process.**

(RP 46-7)

...

A. Correct. The reason why we do that is because the documents that we fill out with the trespass, to make sure that all identification is obtained by me correctly and it's not the wrong address or wrong name, we have a Spanish-speaking translator that works at Safeway that translates everything I said about the trespass. I did say it in English first and then was translated in Spanish to make sure he understood both language.

(RP 54)

...

Q. What did you do after you read him the trespass notice?

A. After I read the trespass and he understood the trespass, we made copies and then called the police department because I can't verify his ID or his identification. The call gets put out through dispatch for an officer to respond to the location.

Q. Why do you have to do that or why is that the standard procedure?

A. Because of the identity. We have to identify and because we don't have a form of identity of the defendant. The subject said that they were fake and that he bought it down in California for \$50. I can't verify who the identity belongs to. That's why we have to call PD.

(RP 55)

(Emphasis mine.)

The "actual" person who potentially would be defrauded may be unknown but it is clear that by the use of another persons social security number in a situation were, as here, it is logical that if the company used the information provided they, the Safeway in this instance, might actually be trespassing a real person who's social security number had been stolen by Vasquez.

On cross examination the Officer Englund stated the initial determination was that Vasquez would be released with a "courtesy

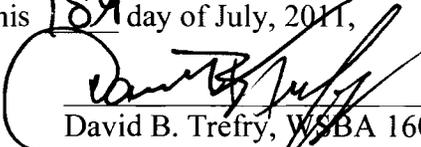
release” and that he would be trespassed from the store. But once again that was not possible because through the use of this forged identification Englund was not able to verify Vasquez’s true identification. The use of this forged document in this instance meets the definition of the crime Vasquez was charged, plead and proven.

The facts that Vasquez was “working” satisfy RCW 9A.60.020, the forgery statute, which once again provides, in relevant part, that a person commits forgery when he or she utters or offers a false written instrument, with “intent to injure or defraud”.

VI. CONCLUSION

The action of Vasquez while not in acts taken against a known individual or company comply with the requirements of the statute he was charged under. The verdict was supported by the facts presented when taken in the best light for the State. The trial court was not in error when it denied the motion to dismiss at the end of the State’s case. This court should grant this Motion and deny the appeal.

Respectfully submitted this 18th day of July, 2011,


David B. Trefry, WSBA 16050
Deputy Prosecuting Attorney
Attorney for Appellant

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DIVISION III
STATE OF WASHINGTON

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DIVISION III

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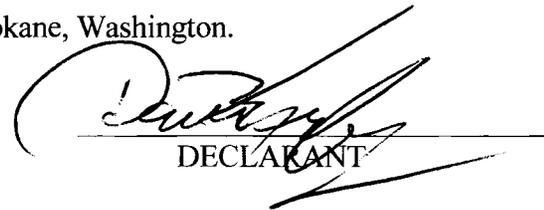
Appellant

NO. 29540-1-III
DECLARATION OF SERVICE

I, David B. Trefry state that on July 18, 2011, emailed by agreement of the parties, a copy of the Respondent's Brief to: Kenneth H. Kato, Attorney At Law, at khkato@comcast.net and by First Class Mail to Vianney Vasquez, 437 Townsite Dr., Vista, CA 92084,

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of July, 2011 at Spokane, Washington.


DECLARANT