

65465-9

65465-9

NO. 65465-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

TYSON J. SPRING,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

Assignments of Error of Appellant Tyson J. Spring –

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Spring intended to deprive another of property received from sale of such property.

2. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Spring, with intent to injure or defraud, offered a written instrument which he knew to be forged.

3. Mr. Spring's right to receive a fair trial was violated where the trial court improperly denied his request to qualify a defense witness as an expert in commercial law and the UCC.

4. Mr. Spring was convicted of forgery under a statute that is concurrent with a regulation governing the conduct of car dealers, which is an unclassified misdemeanor as contained in RCW 46.70.170.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The original Information in this case was filed on January 6, 2009. It charged Defendant Tyson J. Spring (Defendant) with 13 counts of Theft in the First Degree (Counts 1-13) and four counts of Forgery (Counts 14-17). The Amended Information was filed on September 25, 2009, and likewise charged the Defendant with 13 counts of Theft in the First Degree

and four counts of Forgery. The Second Amended Information was filed on February 8, 2010, and also charged the Defendant with 13 counts of Theft in the First Degree and four counts of Forgery.

The Defendant was tried before a jury in King County Superior Court, the Honorable Richard D. Eadie presiding, with testimony beginning on February 16, 2010. RP 211.<sup>1</sup> Counts 6 and 12 were dismissed by the Court at the close of the State's case. After arguments from the attorneys and instructions from the trial court, on March 3, 2010, the jury found Defendant Tyson J. Spring guilty of Theft in the First Degree as charged in Counts 1-3, 5, 7-8, 10, and 13, but acquitted him of Theft in the First Degree as charged in Counts 4, 9, and 11. The jury also convicted the Defendant of four counts of Forgery, as charged in Counts 14-17. CP 126-28.

A sentencing hearing was held on April 23, 2010. Judge Eadie sentenced the Defendant to a sentence at the low end of the standard range on each count of conviction, that is, a sentence of 43 months' imprisonment on the convictions for Theft in the First Degree on Counts 1-3, 5, 7-8, 10, and 13, and a sentence of 22 months' imprisonment for the Forgery counts, Counts 14-17, all sentences to run concurrently with one

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<sup>1</sup> The State will use the same system of reference to the 10 volumes of consecutively paginated trial proceedings as was employed by Defendant in his Opening Brief, that is, RP \_\_\_\_.

another. CP 144-52. Judge Eadie also imposed the \$500 Victim Penalty Assessment and the \$100 DNA collection fee. *Id.*<sup>2</sup> Defendant Tyson J. Spring filed a Notice of Appeal of his conviction and sentence with the Superior Court on May 19, 2010. CP 153-62.

## **2. SUBSTANTIVE FACTS**

### **a. Introduction**

The allegations in the Second Amended Information and the evidence adduced at trial center on the Defendant and his dealings as the President of a Seattle business, Auto Gallery of Seattle (hereinafter "AGS"). In introducing the facts, it is useful to divide the charges in the Information into three groups. First, the charges can be divided between the Theft in the First Degree charges in Counts 1-13, and the Forgery charges, in Counts 14-17. The Theft charges in Counts 1-13 can be further divided into two groups (with the exception of Count 12<sup>3</sup> and Count 13, which alleged a Theft where the victim was the American Marine Bank): Counts 1-3, 5, 7-8, and 10, which charged the Defendant with Theft in connection with his sale of automobiles consigned to AGS

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<sup>2</sup> A restitution hearing was subsequently held on January 12, 2011, but as restitution is not a part of the instant appeal, neither the Defendant nor the State has included the restitution hearing or the Order Setting Restitution as part of the record on appeal.

<sup>3</sup> Judge Eadie granted the State's motion to dismiss Count 12 at the close of the State's case after a witness failed to appear, so this brief will not discuss this count any further. RP 1021.

where he did not pay all or some of the money due to the consignors upon sale of the consigned vehicle; and Counts 4, 6, 9, and 11, which charged the Defendant with Theft in connection with the purchase of one of the consigned vehicles by a third party, who subsequently found he could not obtain legal title to the vehicle he had purchased.

**b. A Representative Consignor-Victim - Consignor  
Candice Oneida - Count 5**

The evidence concerning Candice Oneida, the victim of the Theft in the First Degree charged in Count 5, can serve as something of a template for the evidence concerning the other consignors who were victims of Theft, as also charged in Counts 1-3, 7-8, and 10. Ms. Oneida, who hails from Australia originally, was living in Seattle from 2001 to early 2006. RP 364, 370. As the year 2005 wound down, she was planning to move in early 2006 to New York. RP 365. She had purchased a new 2004 BMW X5 about one and one-half year earlier, but had decided she would not take it with her on her move to New York. RP 364-65.

Ms. Oneida decided to sell her BMW, and did some research on the best way to accomplish that goal. RP 365. She found AGS online, and went to visit its showroom. *Id.* She found AGS to be "clean, professional," and spoke with the Defendant about consigning her BMW

with AGS. *Id.* She ended up visiting AGS two to three times, and always dealt with the Defendant. RP 366.

Ms. Oneida told the Defendant that she was leaving the area. RP 367. She and the Defendant came to an agreement on consigning her BMW with AGS, and agreed on a minimum sales price of \$53,000.

Although she could not recall the exact date of her consignment agreement with the Defendant and AGS, Ms. Oneida testified that "it must have been early January, 2006." RP 369. At that time, she still owed Watermark Credit Union (which held the title to the BMW) about \$57,500 on the vehicle, meaning that if it did sell for \$53,000, she would have still owed some money to Watermark. RP 371. She told the Defendant about the money she still owed to Watermark, and left the keys, the car's books and the vehicle registration with the Defendant, though the title remained with Watermark. RP 372-73. She also left her phone number with him.

Candice Oneida left Seattle for New York a day or two after leaving her BMW at AGS. RP 373. After a first sales opportunity for her car had apparently fallen through, she would try to check in with the Defendant by email periodically, but he did not return her emails. *Id.* She had left her telephone number with him too, but he did not respond by telephone either. *Id.* She would look online at AGS's website, but did not see her BMW among the vehicles listed there for sale. RP 374-75. Now

living thousands of miles from Seattle, she had no way to check whether her BMW was still at AGS or not.

As the winter of 2006 turned into spring, Ms. Oneida kept trying to call the Defendant, more frequently as time passed. RP 375. She also emailed him "many times," but did not have much success in reaching him. RP 375-76. She read the jury an email that she had sent the Defendant on April 5, 2006, in which she complained to the Defendant that she had left eight messages with him or his assistant in the previous month, and had heard nothing back. RP 379.

Candice Oneida was still under the impression that her car was maybe going to be sold in April or May 2006. RP 385. She was still making the monthly payments on the BMW to Watermark Credit Union, and she still had to pay the insurance on it either six or twelve months in advance. RP 384. In May 2006, she was still sending emails to the Defendant "numerous times per week, if not per day." RP 393.

At some point in the spring of 2006, she heard from a Marc Rousso of Seattle. RP 393. He had been able to track down her phone number, and was calling about the title to her BMW. RP 394. He explained to her that he had purchased her BMW in January 2006, and could not figure out why her bank had not released the vehicle title to him. *Id.* Ms. Oneida explained to Marc Rousso that her credit union still held

the title to the BMW because the credit union had not been paid the money owing on the vehicle. *Id.*

Upon discovering from Marc Rousso that the Defendant had actually sold her BMW in January and had not paid her the money she was owed, Candice Oneida contacted the Seattle Police immediately and gave a statement to a Detective Fenkner. RP 394. She eventually got the BMW back from Marc Rousso, but it went to the Watermark Credit Union, which sold it wholesale. RP 395. Ms. Oneida ended up still owing Watermark about \$24,500 after the BMW was sold. *Id.*

Candice Oneida told the jury that she had continued to pay the monthly payments on the BMW from January through June 2006, and also made the insurance payments on it as well, up to the time that her insurance company refused to allow her claim for the theft of the BMW by the Defendant. RP 396. Watermark Credit Union renegotiated her auto loan as an unsecured loan, and she testified that she still owed about \$18,000 on that loan. *Id.* She put her total loss resulting from the consignment of her BMW with the Defendant at approximately \$30,000. RP 397. She faced bankruptcy at one point. *Id.* The Defendant did not reimburse her for any of her loss. *Id.*

**c. A Representative Third-Party Purchaser -  
Purchaser Marc Rousso - Count 4**

Just as the testimony of Candice Oneida typified the experiences of the consignors of vehicles with AGS who were alleged to be the victims of the Thefts charged in Counts 1-3, 5, 7-8, and 10, so did the testimony of Marc Rousso exemplify some of the experiences of good faith purchasers of vehicles from AGS who were to discover that they had purchased vehicles that had been on consignment from individuals who were not paid for their cars by the Defendant. Mr. Rousso was alleged to be the victim of the Theft by deception charged in Count 4.

Marc Rousso lives in Renton and as of January 2006, he had known Tyson Spring for about a year and a half. RP 412-14. In January 2006, he was looking to buy a car, and had been saving up for one for three years. RP 414. His wife was then pregnant, and they decided that they wanted to buy an SUV. *Id.* His wife specifically wanted a BMW X5 (which is an SUV) because she felt it would be a "safe car." RP 414-15.

Marc Rousso told the Defendant what he wanted, and added that he would pay all in cash. RP 414. Within a week of telling the Defendant that, he heard back from the Defendant, who told Mr. Rousso: "I found a great car." *Id.* He asked the Defendant if he and his wife could drive the BMW, and the Defendant agreed. RP 415-16.

His wife liked the car, and so Marc Rousso negotiated a price for the car with the Defendant. RP 415-17. They agreed on a total price of \$52,988.50, and within a couple of days, Mr. Rousso brought his personal check in that amount to AGS and delivered it to the Defendant. RP 417-18. The check is dated "January 24, 2005" only because Mr. Rousso mistakenly entered the year 2005 instead of 2006. RP 418.

Marc Rousso drove his new BMW X5 home that same day. RP 419. The car had license plates and the proper registration tabs, but he did not get the vehicle title to the BMW from the Defendant. RP 419-20. He told the jury that he "kept on expecting something to come in the mail." RP 420. He followed up on this with the Defendant "many times." *Id.* The Defendant later gave Mr. Rousso a temporary plate to put on the back of the BMW. *Id.*

Later, when this temporary plate was about to expire, Mr. Rousso testified that he "kept on calling" the Defendant and asking when he would be getting the vehicle title or new license plate tabs. RP 421. The Defendant was "pretty evasive," and "didn't even return the phone calls." *Id.* Then in April or May of 2006, his wife was pulled over for having expired tabs while driving the BMW. RP 421.

In June 2006, Mr. Rousso was at the "DMV" while in the process of selling his wife's Saab automobile. RP 422. He asked the licensing

clerk there who was the registered owner of the BMW he had purchased from AGS. *Id.* He found that the vehicle was still in the name of Candice Oneida. *Id.*

He immediately called the Defendant and left a voice-mail message: "What are you doing?" *Id.* He then used Google to locate Candice Oneida and succeeded in finding her telephone number in New York. *Id.* When he got a hold of her, he told her, "I have your car." *Id.* Oneida told him that she was about to report it stolen. *Id.*

The Defendant then called him back, and admitted to Rousso that he had "messed up." RP 423. Rousso told him that he wanted his money back for the BMW, but the Defendant told him he wasn't able to repay him. *Id.* Rousso told the jury that he cooperated with the police, and gave the BMW up to them "because I didn't own the car." *Id.*

Marc Rousso and his wife had to pay to lease a car after he surrendered the BMW to the Seattle Police. RP 424. He estimated that the BMW he bought for \$52,998.50 "has cost me almost \$80,000 or \$90,000." RP 424. At some point, he did get approximately \$8,000 back from the Defendant. RP 425.

**d. Other Consignor-Victims And Their Losses**

Like Candice Oneida, other individuals who had consigned vehicles with the Defendant and AGS, and who subsequently discovered

that the Defendant had sold their cars without paying them, testified at trial. These other consignors told stories that had many of the same elements as the testimony of Oneida. Although differing in the particulars, their testimony generally described the consignment of a valuable automobile with the Defendant and AGS, the increasingly frustrating attempts to contact the Defendant to find out what was happening with the consignment, followed by the inevitable discovery that Defendant had sold the vehicle at some point much earlier, and had been concealing that fact from the consignor to stall for time.

Craig Klinkam (Count 1) owned a classic American "muscle car," a 1967 Pontiac GTO. RP 530. He decided to sell it, and consigned the GTO with the Defendant and AGS. RP 543. Their consignment agreement called for Klinkam to receive \$23,500 upon sale of the car, and for the two parties to split any funds received in excess of that amount 50-50. RP 543-44.

One Ross Jarvi actually bought the Klinkam GTO in September 2005, giving the Defendant a check for \$24,672.50 on September 28, 2005. RP 866-67. The Defendant never paid Craig Klinkam any of this money, and Klinkam never got his GTO back. RP 568. Although he had retained the title to the GTO, when the purchaser Ross Jarvi threatened to

sue him to get the title, on the advice of counsel, Klinkam signed the title over to Jarvi. RP 570.

Craig Klinkam had insurance on the GTO, but the insurance company refused to pay him for his loss of the car. RP 570-71. He was able to go after the \$30,000 bond that AGS had, but he had to hire an attorney to do so. RP 568-69. He ended up recovering only \$3,000-\$4,000 because of all the other claimants against AGS's bond. *Id.*

When the Defendant filed a Voluntary Petition in bankruptcy in U.S. Bankruptcy Court in Seattle on September 14, 2006, Craig Klinkam, like many of the other AGS consignors, was listed as an unsecured creditor on the Schedule F, "Creditors Holding Unsecured Nonpriority Claims." Ex. 72, page 18; RP 572-73. He read to the jury a sentence appearing on the first page of the Defendant's bankruptcy petition: "Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors." Ex. 72, page 1; RP 573-74. He realized after reading that that he would receive nothing from the Defendant's bankruptcy proceeding. RP 574.

Zachary Namie (Count 2), like Candice Oneida, owned a BMW X5 automobile. RP 504. He consigned it with the Defendant in about July 2005, and told the jury he had had a consignment agreement with the

Defendant at one time, but no longer had a copy. RP 507. As a result, he could not recall whether he was supposed to receive \$30,000 or \$32,000 when the Defendant sold his BMW. RP 508.

The Defendant sold Namie's BMW to Marquis Weeks, then a rookie running back with the Seattle Seahawks, in September 2005. RP 727, 729. Weeks got a loan from his bank to pay for the car, gave the Defendant a cashier's check for \$37,219 to pay for the BMW, and took possession on September 16, 2005. RP 731-32. The Defendant told Namie that Marquis Weeks, being a Seahawks rookie, had not been paid, and consequently had not been able to pay the Defendant for the BMW. RP 510-11.

The Defendant then offered to make some of the \$710 monthly payments that Namie had been making to the company that had financed his purchase of the BMW, Western Financial Services (WFS). RP 506, 512. The Defendant paid for two or three such payments. RP 512. Other than that, however, the Defendant never paid Namie for his BMW, despite the Defendant's having received \$37,219 for the BMW from Marquis Weeks in September 2005. RP 517, 519.

Meanwhile, Marquis Weeks had no problems with his possession of the BMW, until he was pulled over for speeding in June 2006, and was told by the officer that there were unpaid parking tickets associated with

the car. RP 733. Then Detective Fenkner of the Seattle Police called him and asked him if he had the vehicle title for the BMW. RP 734.

Mr. Weeks told her his bank held the title, only to find out shortly thereafter that his bank did not have the vehicle title. *Id.*

Marquis Weeks never was able to get the title to the BMW. RP 735. Detective Fenkner told him that the police would have to take the BMW so, as he told the jury, he "just gave the car back." *Id.* He still owed his bank about \$30,000 when he surrendered the BMW, but was able to settle with them for half that amount. RP 736.

Michael King (Count 3) owned a BMW 540i that he wanted to sell in 2005. RP 587-88. He consigned his car with AGS in July 2005, with an agreement that AGS would sell the BMW for a price of \$40,000-\$45,000, and that AGS would be entitled to a 10% commission, while he would receive the balance. RP 591-92. He still owed Chase Manhattan Bank (Chase) about \$15,000 on the car at the time, and was making monthly payments of about \$500 via automatic deductions from his bank account. RP 595-96. The bank held the title to the BMW. RP 595.

By early fall of 2005, King owed about \$14,000 to the bank. RP 598. He understood from his agreement with AGS that when his car was sold, the Defendant would contact Chase, get the title, and complete the sale. RP 598-99. Part of the sale proceeds to which he was entitled

would pay off his balance with Chase, and the rest would go to him personally. *Id.*

One Doren Fry purchased King's BMW from AGS for \$43,000 and "change." RP 620. Fry took possession of the BMW on September 26, 2005, the day he delivered his check to AGS for the balance of the purchase price. RP 623-24. He did not receive the title to the car. RP 624.

Meanwhile, Michael King was not paid promptly for his BMW. RP 604. The situation "dragged on for a while," until he finally went down to AGS on two occasions in mid- to late fall, and demanded that the Defendant pay him. RP 605. On the second such occasion, the Defendant wrote him a check for about \$27,000. RP 605-06. The Defendant also told him that AGS would pay the balance owed to Chase, and get the title to Doren Fry. RP 606.

In the end, the Defendant did not pay off the balance owed Chase, and did not get the title to the BMW for Fry. RP 607. King did not get any further money from the Defendant, and ultimately paid off the loan balance to Chase himself, and transferred the title to the BMW to Doren Fry. RP 609-10. King lost about \$14,000 in his consignment transaction with AGS, not including his legal fees. RP 610-11.

Joel Sloss (Count 7) consigned his 1998 Ferrari 355 F1 Beretta F1 automobile with AGS in January 2006, and left it with them to sell it. RP 742-43. The consignment agreement set a price of \$85,000 that he would receive from the sale of the car. RP 746. He also agreed to drop this price by 10% if the Ferrari was not sold within 30 days. RP 767-68. Sloss retained the title to the Ferrari, with the understanding that he would release it when he was paid from the sale proceeds. RP 747.

Sloss eventually learned that a Scott Hensrude had bought his Ferrari. RP 749-51. Scott Hensrude had purchased the Ferrari from AGS in April 2006, and had taken a loan from BECU to pay for the car. RP 883. He paid a total of \$88,496, including taxes and fees, for the Ferrari. RP 884-85. When Joel Sloss called him and told Hensrude he had not been paid for his Ferrari, Hensrude faxed him a copy of the sale and purchase agreement. RP 751, 888.

Sloss then confronted the Defendant about selling his Ferrari without paying Sloss. RP 752. By now, it was mid- to late May 2006. RP 753-54. The Defendant admitted that he had in fact sold the Ferrari. RP 752. There followed a series of emails between the Defendant and Sloss in which the former continued to assure the latter that payment for the Ferrari was imminent. RP 754-58.

Finally convinced that the Defendant was not going to pay him for the Ferrari, Sloss contacted the Seattle Police. RP 758. The police seized the Ferrari from Hensrude, and Sloss regained possession of the Ferrari in June or July 2006. RP 758-59. Hensrude then sued Sloss for possession of the Ferrari later in 2006, and won both in the trial court and on appeal. RP 760, 98.

As part of the damages in the lawsuit filed by Hensrude, Sloss had to pay him \$4,400 in depreciation for the wear and tear on the Ferrari during the time that Sloss had regained possession. RP 761-62. Sloss had to pay attorney's fees for this lawsuit, as well as in another lawsuit brought by the company that insured the Ferrari. *Id.* He told the jury his total losses from the consignment and subsequent loss of his Ferrari came to between \$140,000 and \$150,000. *Id.*

Mark Horne consigned his 2003 Chevrolet Corvette with AGS on October 26, 2005, and was the victim in Count 8.<sup>4</sup> RP 213, 218-19. Horne maintained a condo in Seattle, but by October 2005, he was mainly located in Dutch Harbor, Alaska. RP 213. Horne had bought his Corvette

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<sup>4</sup> The consignment of Mark Horne's Corvette, as well as the consignment of David McKim's Mercedes Benz, involved the forged paperwork that was the subject of Counts 14-17, and will be discussed separately in that context, *infra*.

new in 2003, and had financed the purchase through GMAC. RP 213-14.  
As of October 2005, he still owed \$5,000-\$7,000. RP 221.

The original consignment agreement between Horne and AGS called for Horne to receive \$42,000 from the sale of the Corvette. RP 218. At some point after October, Horne agreed to a lower price of \$38,000. RP 221-22. At some point, Horne testified, the Defendant sent him an email about a sale of the Corvette for \$38,000. RP 223.

As of April 2006, Horne still owed money to GMAC on the Corvette. RP 227. He and the Defendant talked about that situation, and Horne agreed to pay off the balance of his car loan himself, and then get the title to the Corvette from GMAC. RP 226-27. Having possession of the title to the Corvette, he testified, was "my only protection of ownership of the car." RP 227.

From his home in Dutch Harbor, Horne tried to communicate with the Defendant by email. RP 234-36. The Defendant kept promising Horne that payment for his Corvette was imminent through April, May and June 2006. *Id.* Finally, Horne reported the Corvette as stolen with the Seattle Police. RP 237.

Horne also hired an attorney. RP 238. They determined that AGS had sold Horne's Corvette to a Chevrolet dealership, Roy Robinson Chevrolet Subaru in Marysville. *Id.* His attorney checked the records of

the Washington Department of Licensing (DOL), and found title release documents bearing Horne's purported signature. RP 239. Horne was upset to see that his signature had been forged on the paperwork filed with DOL. *Id.*

Roy Robinson Chevrolet had purchased the Corvette from AGS for \$38,000, and gave the check directly to the Defendant on May 9, 2006. RP 315, 320. That dealership had turned around and sold the Corvette to another customer not long afterwards. RP 293. When Mark Horne called Roy Robinson Chevrolet and informed them of the forged paperwork that had been submitted to the dealership and to DOL, the dealership consulted with its attorney, and determined that it had a problem. RP 293-94. After some negotiation, Roy Robinson Chevrolet paid one-half of the purchase price of the Corvette, \$19,000, to Mark Horne to settle his claim. RP 241, 294. Mark Horne never got any money from the Defendant for his Corvette. RP 242.

David McKim (Count 10) of Enumclaw, Washington, consigned his Mercedes Benz E500 automobile with AGS in March 2006. RP 840, 844. The consignment agreement called for McKim to receive \$59,000 from the sale of his car. RP 844-46. At one point in or after April 2006, he called AGS and said he would come by and pick up his Mercedes. RP 846-47. The Defendant told McKim that a "pro athlete from Atlanta" was

going to buy his car, and they just needed a few days to transfer the funds.

*Id.* After hearing a few such stories, and living so far from the center of Seattle where he could check up on his car, probably in about mid-May 2006, McKim again informed the Defendant that he would be coming down to AGS to pick up his Mercedes. RP 847-48.

At this point, the Defendant admitted that McKim's Mercedes was no longer at AGS. RP 848. McKim asked the Defendant how it was possible that his car was not there, when he had yet to be paid for his Mercedes. *Id.* McKim testified that at this point, the Defendant told him: "It's industry practice to deliver a car before it's paid for." *Id.* When he heard this, McKim contacted the Seattle Police and DOL, and hired an attorney. RP 849. Until he talked with DOL, McKim had no idea that vehicle title paperwork with his purported signatures had been filed with DOL. RP 855. The signatures on the DOL documents are not his, and he did not authorize anyone else to sign his name. RP 850-54.

Porter Mathis III of Seattle bought McKim's Mercedes Benz from the Defendant and AGS in May 2006, trading in his 2003 BMW for part of the purchase price. RP 686, 689-91. About two-three months after he purchased the car from AGS, Mathis was visited at his home by the Seattle Police, who told him the Mercedes was stolen. RP 697-99. The police seized the Mercedes and returned it to McKim. RP 699, 855.

Eventually, McKim's insurance company reimbursed him for the Mercedes. RP 856. McKim then signed the title over to Porter Mathis, who took back the Mercedes. *Id.* The Defendant never paid McKim anything for the Mercedes. RP 856.

**e. The Loan From American Marine Bank To AGS  
In December 2005**

In Count 13, the Defendant was charged with Theft in connection with a loan from American Marine Bank (AMB) to AGS in December 2005 that was engineered by the Defendant.<sup>5</sup> RP 648. Christine Christoff, a commercial lender for AMB in its Seattle office at the time, was referred this loan by AMB's President, who had had some dealings with the Defendant and AGS. *Id.* Christoff dealt with the Defendant in negotiating this loan to AGS. *Id.*

Christoff told the jury that the purpose of the loan was to finance AGS's purchase of a new BMW automobile in Germany. RP 648. AGS would receive the loan proceeds from AMB and wire funds to Germany "to release the car." RP 649. The new BMW, a 2006 BMW M5, would then be shipped to Long Beach along with the "vehicle origination documents" from the manufacturer. RP 649, 660.

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<sup>5</sup> Count 13 was originally charged as Theft by deception and by the exertion of unauthorized control. CP 52-53. It was submitted to the jury only on the Theft by deception theory.

Christoff also told the jury the loan to AGS was a secured loan. RP 650-51. AMB's security would be the paperwork accompanying the BMW from its manufacturer, which AMB would retain in its possession until the car was sold. RP 650. AMB would be repaid the loan from the proceeds from the sale of the BMW, after which AMB would release the manufacturer's paperwork to generate a vehicle title for the purchaser of the BMW. *Id.*

The loan was in the principal amount of \$68,000, and was dated December 21, 2005. RP 654. It was a 90-day note, and payment was due on March 31, 2006. *Id.* The loan was to AGS, but the Defendant also signed as an individual guarantor of the loan. RP 652.

Christoff introduced into evidence the various loan documents from this loan. RP 654-63. Among these loan documents was a Commercial Security Agreement between AMB and AGS. Ex. 57; RP 654-56. She read some of the language from this document describing AGS's responsibility to perfect the bank's security interest in the BMW when it arrived in the United States. Ex. 57; RP 654-56. AMB issued a cashier's check in the amount of \$68,016 to fund the purchase of the BMW. RP 662-63.

Christoff testified that time passed after the loan was made, and as of March 1, 2006, she had not heard anything from the Defendant.

RP 663. On April 1<sup>st</sup>, the Defendant told Christoff that he had a buyer for the BMW, and that the sale would happen within 5-7 days. RP 664. She and the Defendant agreed to extend the loan from March 31 to May 31, 2006 based on that schedule. *Id.* The Defendant agreed to meet with her in late April 2006 to sign the loan extension paperwork and to pay a couple of hundred dollars in interest that would be payable. RP 664-65. The Defendant had told Christoff that the shipment of the BMW had been delayed, so she arranged that she would come to AGS's office and bring the loan paperwork, and would inspect the BMW at the same time. RP 665-66.

On the date set for this meeting, April 26, 2005, Christoff went down to AGS to meet the Defendant. RP 666. The Defendant was not there, but had left a check for the amount of the interest due. *Id.* An AGS employee told Christoff that the BMW was being detailed at Stone Guard, and was not available. *Id.* Christoff told the jury that at that point, she was "concerned and frustrated," and she left the loan extension documents at AGS. *Id.*

A couple of days later, the Defendant came by her office with the documents, which he had signed. RP 666. She asked him specifically if he had already sold the car without paying the bank. RP 666-67. The Defendant denied it. *Id.*

After this meeting, which would have taken place about April 28, 2006, Christoff tried to call the Defendant, but did not hear from him. RP 67-68. She went by the AGS location in about early May 2006, and found it "essentially empty." *Id.* One of the bank's collection people determined that the BMW had indeed been sold, and had already been sold a second time. RP 668. AMB determined that the BMW was a "dead end" as far as being collateral for its loan to AGS. RP 668-69.

William Wright of DOL introduced a certified copy of the Certificate of Origin for the BMW that was supposed to be the collateral for AMB's loan to AGS. Ex. 63; RP 956-57. He explained that this Certificate of Origin is what came with the vehicle from the BMW factory, and that it was submitted to DOL when it was sold to a retail customer in Washington to obtain a title and registration for that purchaser. RP 956-58. Wright also introduced a certified copy of another DOL record, a Vehicle Dealer Temp Permit, signed by the Defendant and by one Dwayne Myers. Ex. 65; RP 961. This document reflects that AGS sold the same BMW that was supposed to be the collateral for AMB's loan to AGS to Myers on March 13, 2006, for a price of \$86,950 (a price that would not include fees and taxes). Ex. 65; RP 961.

Deanna Brown, a Vice President and Manager of the Loan Services Department of Columbia Bank (the successor to AMB), identified the

only payments that had been credited to this loan: an interest payment of \$2,200.16 in late April 2006, an extension fee of \$133.33, also paid in late April 2006, and one payment of \$250 applied to the loan on September 12, 2006. RP 805. AMB also exercised its right of offset, authorized by the loan terms, to close a checking account the Defendant had at AMB, and apply the balance of about \$5,200 to the loan balance. RP 805. When the Defendant filed his Voluntary Petition in U.S. Bankruptcy Court in September 2006, he listed AMB as an unsecured creditor for an "[u]nknown amount." Ex. 72, page 15; RP 805-06.

**f. The Forged Documents Filed With DOL**

Counts 14-17 charged the Defendant with Forgery. These Forgery charges, in turn, break down into two groups: Counts 14-15 alleged that the Defendant "did possess, utter, offer, dispose of and put off as true to Roy Robinson Chevrolet and Subaru and to the Washington State Department of Licensing" two documents bearing the purported signature of "Mark B. Horne," knowing the signatures to be forged. CP 53. Counts 16-17 made similar allegations regarding documents filed with DOL bearing the purported signatures of David McKim, the Defendant knowing those signatures too to have been forged. CP 54.

The document alleged to have been forged in Count 14 was a DOL form entitled "Odometer Disclosure/Title Extension Statement Release of

Interest by Registered Owner" (hereinafter "Odometer Disclosure Form"), and the specific such form was introduced into evidence at trial as Ex. 44. William Wright of DOL explained that DOL required Odometer Disclosure Forms to either be notarized by a notary public, or to be certified by a licensed automobile dealer. RP 950, 952. At the bottom of Ex. 44, the Defendant, Dealer No. 2245, certified that Mark B. Horne had signed or attested this document before him on April 19, 2006. Ex. 44; RP 951-52. Mark Horne told the jury that the signature in his name on Ex. 44 was not his, and that he had not authorized anyone else to sign his name for him. RP 229-30, 231.

William Wright also discussed Ex. 43, at trial, another certified copy of a DOL form, this one entitled "Affidavit of Loss Release of Interest" (hereinafter "Affidavit of Loss Form"). Ex. 43; RP 949-50. In this form, Mark Horne is claiming that he has lost the title to his Corvette, and further, that he is releasing his interest in the Corvette. Ex. 43; RP 949. As with Ex. 44, the Odometer Disclosure Form, the Defendant certified that Mark Horne appeared before him to sign Ex. 43 in his presence. Ex. 43.

Mark Horne was actually in Dutch Harbor, Alaska, more than a thousand miles away from Seattle, on April 19, 2006. RP 224-25. The signature of his name on Ex. 44 is not his, and he did not authorize anyone

to sign his name. RP 224-25, 231. Linda Eriksen, Title Clerk at Roy Robinson Chevrolet, testified that she received the Affidavit of Loss Form and the Odometer Disclosure Form for Mark Horne's Corvette from the Defendant. RP 310-15, 322. Roy Robinson Chevrolet filled in the middle section of the Odometer Disclosure Form to reflect the sale of Mark Horne's Corvette by AGS to Roy Robinson Chevrolet. Ex. 44; RP 313. Linda Eriksen then submitted these two forms to DOL when Roy Robinson Chevrolet sold the Corvette to one of its customers. RP 322.

The documents that are at the center of the Forgery charges in Counts 16 and 17 are the same types of DOL forms as those involved in Counts 14-15: an Affidavit of Loss Form and Odometer Disclosure Form, involving not Mark Horne's Corvette, but a Mercedes Benz E500 consigned by David McKim with AGS. Exs. 51-52. Exs. 51 and 52 are, respectively, DOL certified copies of those documents that were filed with DOL, and admitted into evidence at trial. Exs. 51-52; RP 850-54. Both documents bear what purport to be the signature of "David McKim," or "D.W. McKim," or "Dave McKim."

David McKim told the jury that the signatures of his name on these two DOL forms were not his genuine signatures. RP 851-53. He also testified that he had not authorized anyone else to sign his name on these documents. RP 853-54. He added that he did not even know these

documents had been filed with DOL in May 2006 until after the fact, when he learned from the Defendant that he had sold McKim's car without paying him, causing McKim to look into DOL's records relating to his Mercedes. RP 854-55.

**g. The Defendant's Testimony At Trial**

After the State rested, the Defendant took the stand in his own defense. The Defendant was asked about Christine Christoff's characterization of his financial statement as being "very weak," and he agreed that was a "very fair" description. RP 1420. The Defendant also agreed that he had sold the BMW M5 that he had purchased with the loan from AMB to Dwayne Myers on March 13, 2006, and had received \$86,000 from Myers for the car. RP 1424-25. The Defendant also admitted that he had extended the loan from AMB in late April 2006 simply to stall the bank. RP 1426.

The Defendant admitted that he made false statements to Ms. Christoff and various consignors. About consignor Mark Horne, he said: "When I needed to stall for time, I would tell him things that weren't true." RP 1328. A little later in his testimony, he added: "I hate the fact that I told lies to people to stall them." RP 1344.

#### **h. The Jury's Verdict And Sentencing**

At the close of all the evidence, the jury was instructed and retired to its deliberations. On March 3, 2010, the jury returned its verdicts. It found the Defendant guilty of Theft in the First Degree as charged in Counts 1-3, 5, 7-8, 10, and 13 of the Second Amended Information. CP 126-28. The jury found the Defendant not guilty of Theft in the First Degree, as charged in Counts 4, 9, and 11. CP 126-28. Finally, the jury found the Defendant guilty of Forgery, as charged in each of Counts 14-17. CP 126-28.

Sentencing was held on April 23, 2010. Judge Eadie sentenced the Defendant to forty-three (43) months in custody on each of Counts 1-3, 5, 7-8, 10, and 13, said terms to run concurrently with one another, and with the term imposed on the Forgery counts. CP 147. On the Forgery counts, Counts 13-17, Judge Eadie imposed a term of twenty-two months on each of those counts, said terms to run concurrently with one another, and concurrently with the terms imposed on the Theft counts. *Id.* The Court also ordered the Defendant to pay restitution in an amount to be determined at a restitution hearing to be held at a future date. CP 146. The Defendant filed his notice of appeal to the Court of Appeals on May 19, 2010. CP 153-62.

C. ARGUMENT

1. **THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD CONVICT THE DEFENDANT OF THEFT BY EXERTION OF UNAUTHORIZED CONTROL AS CHARGED IN COUNTS 1-3, 5, 7-8, AND 10.**

The Defendant's first argument is that there was insufficient evidence adduced at trial from which a rational jury could have found him guilty of Theft in the First Degree, as charged in Counts 1-3, 5, 7-8, and 10. These were all counts in which the charges were centered on the consignment of automobiles with the Defendant and AGS, the subsequent sale of those vehicles, and the Defendant's not using the sale proceeds to pay the consignors according to the respective consignment agreements in place. The victims in all of these counts were the individuals who consigned their automobiles with the Defendant and AGS.

Before addressing the Defendant's specific arguments on this point, it would be helpful to be mindful of some of the basic principles governing a challenge to the sufficiency of evidence on appeal. In assessing the sufficiency of the evidence, a reviewing court must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205, *cert. denied*, 549 U.S. 978, 127 S. Ct. 440, 166 L. Ed. 2d 312 (2006); *State v.*

*Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). “A claim of insufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A jury’s guilty verdict will be upheld if supported by substantial evidence in the record, viewing the evidence and the inferences flowing therefrom most favorably to the State. *Luther*, 157 Wn.2d at 78.

In Counts 1-3, 5, 7-8, and 10 of the Second Amended Information, the Defendant was charged with Theft in the First Degree. Those counts charged, in particular, that he “did exert unauthorized control” over the property of another, in violation of RCW 9A.56.020(1)(a) and 9A.56.030(1)(a). CP 45-51. The latter statute, 9A.56.030(1)(a), at the time defined Theft in the First Degree as the theft of “[p]roperty or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010.”

RCW 9A.56.020(1)(a) provides one of the three definitions of “Theft” in that statute. That subsection reads: “(1) ‘Theft’ means: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services ....” RCW 9A.56.010, in turn, provides

definitions of some of the terms used in RCW Chapter 9A.56. RCW 9A.56.010(19) reads in pertinent part as follows:

(19) "Wrongfully obtains" or "exerts unauthorized control" means:

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(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, **trustee**, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, **withhold, or appropriate the same to his or her own use or to the use of any other person other than the true owner or person entitled thereto ....** (emphasis added).<sup>6</sup>

The Defendant's argument omits a key part of the State's theory of prosecution on these counts charging Theft by exertion of unauthorized control. The Theft statutes quoted, *supra*, must be read in conjunction with certain other provisions of the Revised Code of Washington and the Washington Administrative Code (WAC) that are relevant to the facts developed at trial. The evidence demonstrated at trial that the Defendant's business, AGS, was a vehicle dealership licensed by DOL, until the Defendant surrendered that license to DOL personnel on June 14, 2006.

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<sup>6</sup> In Counts 4, 6, 9, and 11, the Defendant was charged with Theft in the First Degree "by color and aid of deception." All of the alleged victims were third parties who had purchased consigned vehicles from AGS, only to have trouble afterwards obtaining the vehicle's title. The trial court dismissed Count 6 at the close of the State's case, and the jury acquitted the Defendant on Counts 4, 9, and 11. Count 12 was also dismissed by the Court at the close of the State's case. Count 13, where the victim was American Marine Bank, was originally charged as both Theft "by color and aid of deception" and Theft by unauthorized control, but was only submitted to the jury on the former theory.

RP 469. The evidence at trial also showed that all of the victims in Counts 1-3, 5, 7-8, and 10 were individuals who had consigned their vehicles with the Defendant and AGS. That evidence in turn implicated a statute regulating consignment sales by licensed vehicle dealers. RCW 46.70.028, subtitled "Consignment," reads as follows:

Dealers who transact dealer business by consignment shall obtain a consignment contract for sale and shall comply with applicable provisions of chapter 46.70 RCW. The dealer shall place all funds received from the sale of the consigned vehicle in a trust account until the sale is completed, except that the dealer shall pay any outstanding liens against the vehicle from these funds. Where title has been delivered to the purchaser, the dealer shall pay the amount due a consignor within ten days after the sale. However, in the case of a consignment from a licensed vehicle dealer from any state, the wholesale auto auction shall pay the consignor within twenty days.

RCW 46.70.028, then, makes a licensed dealer who engages in a consignment sale a trustee for the consignor of the funds received from the sale of the consigned vehicle. Under Washington law, therefore, the Defendant was a trustee of all the funds received from the sale of vehicles consigned with him and AGS. The evidence at trial as to Counts 1-3, 5, 7-8, and 10 demonstrated conclusively that the Defendant did not pay over to his consignors all (or, in most cases, any) of the funds the Defendant had received from selling the consigned automobiles.

The Defendant admitted on cross-examination that he used the money he received from selling the consignors' automobiles to try to keep AGS afloat. RP 1397. In order to stall the consignors and prevent them from realizing what was happening until it was too late, he simply misrepresented the facts to them, early and often. As he put it in his testimony: "I made a horrible, horrible decision, I lied, it hurt, and I did it over and over, and over again." RP 1438.

The evidence demonstrated conclusively, in other words, that the Defendant exerted unauthorized control over the funds he received from selling consigned automobiles within the meaning of RCW 9A.56.010(19) by withholding that money from the consignors who were entitled to those funds when their vehicles were sold, although he was by law a trustee for that money, and using the proceeds instead to try to keep AGS in business to salvage his own investment. In the end, when the Defendant filed his petition in U.S. Bankruptcy Court on September 14, 2006, every one of the consignor victims was listed as an unsecured creditor on the Schedule F. Ex. 72, Schedule F at pps. 18-19, 21-25, and 28. And the first page of that bankruptcy petition advised those unhappy occupants of Schedule F that "there will be no funds available for distribution to unsecured creditors." Ex. 72, page 1.

The Defendant's argument on this point is essentially a recapitulation of his argument to the jury that he intended to repay the consignors their money at some future date, by the means of funds whose source was not identified. This argument culminates thus (at 12):

"Mr. Spring's repeated attempts to reach out to consignors and engage in settlement agreements, both formal and informal, indicate the opposite of an intent to permanently deprive the consignors of their property." This is an incorrect formulation of the intent to deprive in a Theft prosecution.

As early as 1923, in a prosecution for what was then known as "larceny by embezzlement," the Washington Supreme Court held that such intent to deprive did not have to be an intent to deprive the victim permanently of the property or services at issue. *State v. Larson*, 123 Wash. 21, 29, 216 P. 28 (1923) (as revised upon reconsideration). Washington courts since then have applied that ruling to all the various ways in which a defendant may commit Theft under the modern Theft statutes. In *State v. Dorman*, 30 Wn. App. 351, 354-55, 633 P.2d 1340, *review denied*, 96 Wn.2d 1019 (1981), Division One of the Washington Court of Appeals, citing *Larson*, held that intent to permanently deprive was not an element of Theft by the exertion of unauthorized control. In *State v. Komok*, 113 Wn.2d 810, 814-17, 783 P.2d 1061 (1989), the Supreme Court held that a charge of Theft by taking did not require an

intent to permanently deprive the victim of his property or services. In *State v. Grimes*, 111 Wn. App. 544, 556, 46 P.3d 801 (2002), *review denied*, 148 Wn.2d 1002 (2003), this Court, citing *Komok* and *Dorman*, held that an intent to permanently deprive was not a necessary element of Theft by embezzlement or Theft by deception. The evidence at trial, reflecting as it did the substantial losses incurred by each of the consignor victims in Counts 1-3, 5, 7-8, and 10, was quite sufficient to show the Defendant's intent to deprive his consignors of the proceeds from the sale of their respective vehicles. It was not necessary to show an "intent to permanently deprive."

**2. THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD CONVICT THE DEFENDANT OF FORGERY AS CHARGED IN COUNTS 14-15.**

The Defendant's second point on appeal is his argument that there was insufficient evidence to convict the Defendant of Forgery. The Defendant specifically claims that the evidence on Counts 14 and 15, the forgery charges involving documents bearing the purported signatures of consignor Mark Horne, was insufficient. The Defendant does not argue that the evidence on Counts 16 and 17, in which the Defendant was also convicted of Forgery, was insufficient.

Counts 14 and 15 charged that the Defendant, "with intent to injure or defraud, and knowing the same to be forged, did possess, utter, offer, dispose of and put off as true to Roy Robinson Chevrolet and Subaru and to the Washington Department of Licensing" an Odometer Disclosure Form and an Affidavit of Loss Form bearing the purported signatures of Mark Horne. CP 53. These documents were submitted by the Defendant to Roy Robinson Chevrolet and Subaru when the Defendant sold Horne's Corvette to that dealership. RP 310-15. Roy Robinson Chevrolet and Subaru then in turn submitted these documents (Exs. 43 and 44) to DOL for filing when it sold the Corvette to one of its customers. RP 322.

The heart of the Defendant's argument on this point is stated thus in his Opening Brief (at 14):

Because there was no evidence that Mr. Spring intended to defraud Mr. Horne by offering these documents to facilitate the sale of Mr. Horne's vehicle without his consent, and because these documents were consistent with Mr. Horne's intentions, these forgery convictions must be reversed and dismissed.

An analysis of this argument is somewhat fact-intensive, and a brief review of the pertinent fact is therefore necessary. As of April 19, 2006, Horne still owed money to GMAC on the Corvette. RP 226-27. Horne and the Defendant talked it over, and agreed that Horne would pay off the approximately \$5,000-\$7,000 he still owed GMAC. RP 227.

Horne could not recall the exact date of this conversation, but his goal in paying off GMAC was to have it send him the title to the Corvette when it received his payment. RP 226-27. Having the Corvette's title in hand would be, he testified, "my only protection of ownership of the car." RP 227.

Horne did pay off his balance on the Corvette with GMAC, but did not get the title. RP 254. It was at this point that the Defendant called Horne in Alaska, and told him that, as Horne put it, he "was going to send me a document so we can get a lost title and get title to the car." RP 255. Horne thought this was appropriate: "Well, we needed title. Let's get a title." *Id.* The Defendant then sent him some documents, with indications of where to sign, explaining to Horne that "this will allow us to get the title, and then we can proceed to sale." RP 256. Horne later signed a "lost title" document and an "odometer statement," part of "four documents to get the title." *Id.* He then mailed the documents back to the Defendant. RP 255.<sup>7</sup>

The Defendant's argument, then, is that because Horne signed this later set of documents, including an Affidavit of Loss Form and an Odometer Disclosure Form, the Defendant could not have had, as a matter

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<sup>7</sup> Neither side offered into evidence any documents that Mark Horne actually did sign and mail back to the Defendant at some point.

of law, the requisite "intent to injure or defraud" Horne in submitting Exs. 43 and 44 to Roy Robinson Chevrolet and Subaru and to DOL. There is a key difference in Horne's intent in signing the later set of documents. As Horne testified, when he did not get the title to the Corvette from GMAC after paying off the loan, "we were going to do an affidavit of lost title," the purpose of which, he added, would be to get the title "[f]or me." RP 231. But that is not what Ex. 43, which bears his forged signature, accomplished.

Ex. 43 (Count 15) is the form entitled "Affidavit of Loss Release of Interest." The middle section of this form (which has the word "Release" along the left-hand column) recites: "By my signature I release my interest as Legal Owner of the vehicle/vessel described above. (**Note:** This Release of Interest must be signed by **ALL** Legal Owner(s), **with signatures notarized**; use additional forms if necessary.)" (emphasis in original). Underneath that recital, the name "Mark B. Horne" is signed in a space over the words "Signature of person releasing interest." Ex. 43. The Defendant signed the Certification at the bottom of this form, certifying that Mark Horne had appeared before him on April 19, 2006, and had signed the Affidavit of Loss Form before him. Ex. 43.

In fact, Mark Horne did not sign Ex. 43, nor did he authorize anyone to sign his name on Ex. 43. RP 224-25, 231. Horne's testimony at

trial made it clear that when he later signed some DOL forms and mailed them back to the Defendant, he did not intend to release his interest in his Corvette. As he testified: "I signed off only to get a title for the car, not releasing interest in the car or anything to that effect." RP 255-56. He added later that he "didn't agree to release the title." RP 259.

Exhibit 44, the Odometer Disclosure Form, has some language that is similar to the language in Ex. 43. As with the Affidavit of Release Form (Ex. 43), the Odometer Disclosure Form has vehicle identification information for the Corvette at the very top. Ex. 44. The section just below the identification information, dated April 19, 2006, indicates a sale of the Corvette from Mark Horne to the Defendant and AGS. Mark Horne's purported signature here is signed over the words "Signature of TRANSFEROR/SELLER." Ex. 44. The next section, at the middle of the form, dated April 20, 2006, indicates a further sale of the Corvette, this time from the Defendant to Roy Robinson Chevrolet. Ex. 44.

Mark Horne told the jury he did not agree to sell or transfer his Corvette to the Defendant on April 19, 2006. RP 230. It is not his signature on Ex. 44. *Id.* He did not authorize anyone else to sign his name on Ex. 44 on April 19, 2006. RP 231. On that date, he was in Dutch Harbor, Alaska, far from Seattle. RP 224-25.

Rather than citing the case law cited in this brief's response to the Defendant's first point, on the appellate challenge to the sufficiency of evidence on the Theft counts, *supra*, the State will simply incorporate those cases by reference here. There is more than sufficient evidence here from which a rational jury could find the Defendant guilty of Forgery on Counts 14 and 15. Mark Horne testified unequivocally that he did not sign Ex. 43 or 44, and did not authorize anyone else to sign them for him.

As Horne also pointed out in his testimony, it would have been absolutely against his interest to sign these documents on April 19, 2006. His forged signatures on Exs. 43 and 44 allowed the Defendant to sell the Corvette to Roy Robinson Chevrolet without Horne's knowledge or approval, and to keep the \$38,000 he received for that sale without Horne's knowledge. The jury could well infer from the testimony and the exhibits that Roy Robinson Chevrolet, like AGS a licensed dealership, would not be releasing funds for the Corvette until it had all the necessary paperwork from AGS in hand. The Defendant could not merely promise a title sometime later, after receiving the money from a purchaser, as he did, for example, when he sold Candice Oneida's BMW to Marc Rousso.

The forged documents helped the Defendant to stall Mark Horne, and to use what was rightly Horne's money to keep the Defendant's business afloat a little longer. As late as June 15, 2006, the Defendant was

still assuring Horne in an email that, "I will contact you Monday to finish this transaction completely." RP 235-36. There was plenty of evidence from which the jury could find that the Defendant had the requisite "intent to injure or defraud" Mark Horne in submitting these forged documents.

**3. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS IN LIMITING THE TESTIMONY OF DEFENSE WITNESS DAVID SMITH.**

The Defendant's third argument on appeal is that the trial court erred in limiting the expert testimony of attorney David Smith, who was called by the defense to testify at trial. Smith had been retained as counsel for the Defendant and AGS in May 2006. RP 1497. At trial, outside the presence of the jury, the defense made an offer of proof of Smith's sworn testimony as an expert on the Uniform Commercial Code (UCC) in Washington. RP 1479-90. This proffered testimony of David Smith was entirely concerned with the interplay of a Washington statute, RCW 10.79.050, and the provisions of the UCC in Washington. Smith's testimony would then discuss how this interplay among these Washington statutes affected the rights of the purchasers of vehicles that had been consigned to AGS. According to the defense proffer, Smith would specifically testify that the four alleged victims who were purchasers of consigned vehicles actually had a legal right to the title to those vehicles,

and should prevail as against the consignors of these respective vehicles.<sup>8</sup>

RP 1489-90.

RCW 10.79.050 reads as follows:

All property obtained by larceny, robbery or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his or her rights to such property; and it shall be the duty of the officer who shall arrest any person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he or she shall be answerable for the same, and shall annex a schedule thereof to his or her return of the warrant.

This is the statute pursuant to which the Seattle Police Department seized vehicles purchased by third-party purchasers from AGS (such as Porter Mathis III, Marquis Weeks, and Scott Hensrude) when the individuals who had consigned them with AGS realized that their cars had been sold and they had not been paid, and reported them as stolen. RP 1482-86. Smith testified during this proffer that he had read a Law Review article and had researched pertinent case law, and had concluded that the provisions of the UCC in Washington implicitly strongly limited, if not totally eliminated, the police's powers under RCW 10.79.050, at least in

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<sup>8</sup> The four purchasers referred to were the alleged victims in Counts 4 (Marc Rousso); Count 6 (Dalles Sullivan); Count 9 (Roy Robinson Chevrolet); and Count 11 (Porter Mathis III). In these four counts, the Defendant was charged with Theft "by color and aid of deception." CP 45-51. In these counts, the prosecutive theory was that the Defendant obtained the money to purchase the consigned vehicles from the purchasers by deceiving them about their ability to get legal title to the vehicles. RP 1053-55.

the case of a good faith purchaser of a consigned vehicle. In other words, the proffer of David Smith's proposed expert testimony was entirely aimed at exculpating the Defendant on the charges of Theft by deception in Counts 4, 6, 9, and 11. The Defendant was not convicted on any of these counts, however. Judge Eadie dismissed Count 6 at the close of the State's case when Dalles Sullivan did not appear to testify. RP 1022, 1026. The jury acquitted the Defendant on all three of the other Theft by deception charges, Counts 4, 9, and 11. CP 127. David Smith's proposed testimony concerning the rights of those purchasers is therefore not relevant to any count of conviction on appeal.

This is no doubt why on appeal the defense has reframed the offer of proof involving David Smith. In his Opening Brief (at 21), the Defendant describes the offer of proof thus:

Defense counsel then asked to make an offer of proof, stating that he intended to call David Smith as not only a transactional witness, but also as an expert witness on the UCC, in order to elaborate on the American Marine Bank deal involving the new BMW imported from Germany (count 13). RP 1467-68. (footnote omitted).

Although defense counsel did make a brief reference to AMB at page 1467, it did not amount to an actual offer of proof: "The funny thing there was discussion with Mr. (sic) Christoff from American Marine Bank. They could file a UCC in order to protect their security interest. The UCC

transcends this whole case, your Honor, with regard to the commercial transactions."

In the actual offer of proof with David Smith's sworn testimony, however, the proffer did not touch at all on AMB or the filing of a UCC claim on the BMW M5 that was supposed to be the collateral for the loan to AGS. RP 1479-90. Even more fundamentally, the defense here never does explain just how such testimony from David Smith about the UCC and AMB's loan to AGS would exculpate the Defendant. Here is one such attempt at articulating the exculpatory nature of the supposedly excluded testimony (Defendant's Opening Brief at 22):

It was imperative that Mr. Spring be able to present evidence concerning the American Marine Bank loan to the jury, and to be able to distinguish for the jury between a signature loan and a secured loan. RP 1515-19. Expert testimony on commercial law and the UCC was crucial to the jury's understanding the evidence in this complex case. Reese v. Stroh, 128 Wn.2d at 306; ER 702.

The portion of the transcript cited in this excerpt, RP 1515-19, was a portion of the cross-examination of David Smith concerning the AMB loan to AGS during Smith's testimony before the jury. The passage from the Defendant's Opening Brief, *supra*, does not shed any light on just what evidence was not allowed to be presented, or how it would have exculpated the Defendant. And neither does this excerpt, also from his Opening Brief (at 22-23):

Mr. Spring's defense was critically restricted when the trial court denied the motion to permit David Smith to be qualified as an expert witness. The expert testimony of this witness was highly relevant to Mr. Spring's defense - particularly to his explanation concerning the transaction involving the American Marine Bank. Mr. Smith's testimony concerning the application of the UCC to the transaction would have exculpated Mr. Spring, and would certainly have assisted the jury in understanding the complex financial evidence at trial. Mr. Spring had the constitutional right to present this evidence so that the jury had the information needed to determine whether or not the State had met its burden to prove theft in the first degree on this particular count. The trial court's ruling thus violated his due process right to present a defense. Maupin, 128 Wn.2d at 924. (footnote omitted).

This argument too presents only conclusions. It utterly fails to identify what this "expert testimony" would have been, why it was "highly relevant," and even what exactly the Defendant's defense was to the charge of Theft in the First Degree in Count 13.

The Defendant's Opening Brief makes one final stab at showing the substance and relevance of the supposedly excluded evidence (at 24): "Without this expert witness, no witness could assist the jury in understanding the complex area of the UCC." A little later, the Defendant argues (also at 24): "The error went to the heart of Mr. Spring's defense, particularly on the transaction with American Marine Bank, and the State cannot demonstrate that the error was harmless beyond a reasonable doubt." Once again, there is an utter failure to explain what "complex area

of the UCC" is being referenced, or how testimony thereon would have gone to "the heart of Mr. Spring's defense." For that matter, the Defendant's brief never does state exactly what that defense to the charge in Count 13 might be.

This Court has previously held as follows:

An offer of proof "informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record for adequate review."

*Estate of Bordon v. State, Department of Corrections*, 122 Wn. App. 227, 246, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005) (quoting *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921 (1993) (quoting *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991))). Here, there was never any offer of proof made as to David Smith's proffered testimony concerning the UCC and the AMB loan to AGS before Judge Eadie in the trial court. He can hardly be said to have abused his discretion on this issue when he was never asked to exercise it in the first place. This argument is without merit.

**4. THE FORGERY STATUTE, RCW 9A.60.020, AND RCW 46.70.180(12)(b) ARE NOT CONCURRENT STATUTES.**

The Defendant's last argument on appeal concerns his convictions for Forgery on Counts 14-17. He argues that because the Forgery statute

is concurrent with RCW 46.70.180(12)(b), the Defendant could only be charged under the latter statute. Defendant's Opening Brief at 25-30. The Defendant's convictions for Forgery on Counts 14-17, the argument continues, must therefore be reversed. This argument does not analyze the two statutory schemes, and lacks any merit.

This Court will review issues of statutory construction, including whether statutes are concurrent, *de novo*. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194, *cert. denied*, 552 U.S. 992, 128 S. Ct. 512, 169 L. Ed. 2d 342 (2007); *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630, *review denied*, 160 Wn.2d 1022 (2007). Statutes are only concurrent when every violation of a specific statute would result in a violation of a general statute. *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010); *State v. Ou*, 156 Wn. App. 899, 902, 234 P.3d 1186 (2010), *review denied*, 170 Wn.2d 1017 (2011); *Chase*, 134 Wn. App. at 800. Conversely, if a person can violate the specific statute without violating the general statute, the statutes are not concurrent. *Wilson*, 158 Wn. App. at 314.

This Court has held that whether statutes are concurrent involves the examination of the elements of the statutes, not the facts of the particular case. *Wilson*, 158 Wn. App. at 314; *Chase*, 134 Wn. App. at 802-03. The Defendant was convicted in Counts 14-17 of Forgery, in

violation of RCW 9A.60.020(1). RCW 9A.60.020(1), which would be the general statute for purposes of this analysis, reads:

(1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He falsely makes, completes, or alters a written instrument or;

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

The more specific statute that the Defendant claims is concurrent with the Forgery statute is RCW 46.70.180(12)(b), which reads:

Each of the following acts or practices is unlawful:

\*\*\*

12) For a buyer's agent, acting directly or through a subsidiary, to pay to or to receive from any motor vehicle dealer any compensation, fee, gratuity, or reward in connection with the purchase, sale, or lease of a new motor vehicle. In addition, it is unlawful for any buyer's agent to engage in any of the following acts on behalf of or in the name of the consumer:

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(b) Signing any vehicle purchase orders, sales contracts, leases, odometer statements, or title documents, or having the name of the buyer's agent appear on the vehicle purchase order, sales contract, lease, or title ....

Pursuant to RCW 46.70.170, any violation of RCW Chapter 46.70 is a misdemeanor.

Even the most casual glance at these two statutes reveals a significant difference between the two: a violation of the Forgery statute

requires that a defendant act "with intent to injure or defraud." There is no such intent requirement in RCW 46.70.180(12)(b), and in fact that statute has no mens rea element at all. It is therefore quite possible that someone could violate the more specific statute here because of simple negligence or otherwise, without any of the "intent to injure or defraud" required to constitute a violation of the Forgery statute.

RCW 9A.60.020(1) and RCW 46.70.180(12)(b) are therefore simply not concurrent. The Defendant was properly convicted of Forgery in Counts 14-17. The Defendant's argument is without merit.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Court affirm the Defendant's conviction for Theft in the First Degree on Counts 1-3, 5, 7-8, 10, and 13, and for Forgery on Counts 14-17.

DATED this 3<sup>rd</sup> day of May, 2011.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

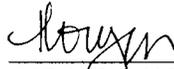
STATE OF WASHINGTON, )  
)  
) No. 65465-9-I  
Respondent, )  
)  
vs. ) AFFIDAVIT OF SERVICE  
)  
TYSON J. SPRING, )  
)  
Appellant. )  
)  
)  
\_\_\_\_\_ )

STATE OF WASHINGTON )  
) ss.  
COUNTY OF KING )

MONICKA S. LY-SMITH, being first duly sworn on oath, deposes and says: That she is an American citizen over 21 years of age, that on the 4<sup>th</sup> of May 2011, she served via legal messenger (ABC-Legal Services, Inc.) Jan Trasen, Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, attorneys for Appellant Tyson J. Spring, with one copy of **Brief of Respondent**. The original of same document was filed with the Court of Appeals, Division I.

  
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MONICKA S. LY-SMITH

SUBSCRIBED AND SWORN to before me this 4<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
TARA K. LONGEN  
NOTARY PUBLIC in and for the State of Washington, residing at Gig Harbor.

