

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 63337-6-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
MELISSA JOSLIN aka MELISSA P.	)	UNPUBLISHED OPINION
FRENICK,	)	
	)	FILED: March 19, 2012
Appellant.	)	
_____	)	

Becker, J. — Melissa Frenick<sup>1</sup> was convicted by a jury of 19 counts of theft based on evidence that she used her position as a bookkeeper to orchestrate numerous unauthorized payments to herself from her former employer. Frenick's trial counsel was not ineffective for failing to request a jury instruction on a good faith claim of title defense that was not supported by the evidence. And the prosecutor did not engage in misconduct during cross-examination by asking a witness whether another witness testified inaccurately

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<sup>1</sup> We refer to the appellant by her married name, Melissa Frenick.

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with respect to specific material details. Accordingly, we affirm.

## FACTS

Melissa Frenick worked for the Seven Seas Fishing Company for approximately one year and a half, from September 2003 until May 2005. Seven Seas managed a fish processing vessel, the Stellar Sea. Frenick's duties included processing payroll for the small staff of Seven Seas and for management staff on the vessel, paying bills, keeping accounting records, reconciling the office and boat accounts, and general office duties. Frenick's spouse, Zachary Frenick, was a management employee who worked on the Stellar Sea until December 2004.

During her employment, Frenick had full access to the computerized accounting systems for both the office and the boat and worked closely with her counterpart on the vessel, the ship's purser, Jennie Wigner. While the ship was at sea, Wigner processed payroll for the vessel's hourly employees. These employees were paid from the Stellar Sea's account. In addition to issuing paychecks to employees, Wigner also made payments to child support agencies on behalf of employees with wage assignments and satisfied other wage garnishment orders. Wigner was not authorized, however, to pay another individual for an employee's work. Frenick supplied Wigner with blank check stock for the boat account, but withheld some of the blank checks in the office every time she provided a batch of new blank checks to Wigner.

In May 2005, one of the office employees found a document in a copy machine providing false payroll information on behalf of Edward Prettyman, a

former Stellar Sea employee and a close friend of Frenick. Frenick admitted to creating the document, and the president of the company terminated her employment. A couple of months later, the bookkeeper who was hired to replace Frenick was verifying the accuracy of the accounting records for May 2005 and discovered that several transactions listed on the bank statement for that period were not recorded in the company's accounting system. Moreover, the cancelled checks for those transactions were missing from the file. The bank provided copies of the cancelled checks. Each check was payable to Frenick's spouse, who was not an employee at the time the checks were issued.

Seven Seas then conducted a complete review of the accounting system and bank account records for the duration of Frenick's tenure. Through this process, the company discovered over 20 unauthorized checks issued between April 2004 and May 2005. The majority of the checks were made out to "Zac Frenick." Several others were payable to a family law attorney Frenick had retained. One check was issued to Frenick herself, one check was made out to Prettyman, and another to Prettyman's girl friend. For the most part, the payees for these checks were listed in the accounting records as various state child support agencies. The total amount of the checks was approximately \$40,000. All of the checks were issued from the Stellar Sea's account and all but one bore Wigner's name, but she claimed her signatures were forged.<sup>2</sup>

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<sup>2</sup> One check to Frenick's attorney had been signed by the ship's captain. He did not recall signing the check and did not generally question checks he was asked to sign by Frenick or Wigner.

The State charged Frenick with 12 counts of first degree theft and 8 counts of second degree theft.

It was uncontested that Frenick received the funds. All the checks made out to Frenick or Zac Frenick were deposited into the Frenicks' joint account and bank video footage showed Frenick depositing many of the checks. But Frenick claimed that the checks to her husband represented payment to her for overtime she worked on the Stellar Sea when the vessel was in port. She explained that the checks were not written in her name because Seven Seas was owned by another company and that company would not approve payment for her overtime work on the vessel. She therefore requested her checks to be written to her spouse. She also claimed that the checks may have included reimbursement for company expenses she personally incurred. Frenick alleged that Seven Seas accused her of theft and falsified the evidence to support those accusations in order to discredit her because after she was fired, Frenick contacted government officials and offered to cooperate in a pending investigation by the Maritime Administration and the National Oceanic and Atmospheric Administration (NOAA). The president of Seven Seas contacted NOAA to inform it of the charges against Frenick. Frenick pointed out that after she was fired, the company had the ability, opportunity, and motive to manipulate the evidence and also had access to documents that would have supported her claim that the payments were legitimate.

The jury found Frenick guilty on 19 out of the 20 charges.<sup>3</sup>

## GOOD FAITH CLAIM OF TITLE DEFENSE

Based solely on her testimony that the checks issued to her spouse reflected legitimate payments to her, Frenick argues that her trial counsel was ineffective for failing to propose an instruction on the good faith claim of title defense.

A defendant is entitled to an instruction on good faith claim of title under RCW 9A.56.020(2)(a)<sup>4</sup> when she presents evidence that (1) the taking of property was open and avowed and (2) has shown circumstances which permit an inference that the defendant has some legal or factual basis for a good faith belief that she has title to the property. State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715 (1995). A defendant who is relying on the good faith claim of title defense “must do more than assert a vague right to property.” Ager, 128 Wn.2d at 95.

In Ager, officers of an insurance company convicted of embezzlement argued on appeal that they were entitled to an instruction on the defense of good faith claim of title. They claimed that the funds they took were advances from the company. The advances were recorded in the company's books, and the insurance code permitted insurance companies to give advances to its officers.

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<sup>3</sup> The jury acquitted Frenick on one count of second degree theft pertaining to the check issued to Prettyman's girl friend.

<sup>4</sup>Under RCW 9A.56.020(2), “In any prosecution for theft, it shall be a sufficient defense that: (a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.”

There was no evidence, however, that the company had authorized advances to its officers. Nor was any evidence admitted such as “past practices of the company with respect to advances, acts showing that past advances of this nature were approved or acknowledged by the board of directors, or statements by directors of the company” which might have allowed the jury to infer that defendants had a good faith belief they had a right to take and use the funds. Ager, 128 Wn.2d at 97. Therefore, while there was evidence to support the open taking requirement, there was insufficient evidence of a legal or factual basis to support the officers’ assertion they had a good faith belief they were entitled to the advances. Ager, 128 Wn.2d at 96-97.

The evidence presented in this case did not support either prong of the good faith claim of title defense. Unlike the case in Ager, where the transactions were transparently reported on the books, the taking of property here was concealed because the checks were written to other people, the true payee’s name was not recorded in the accounting records, and the cancelled checks were omitted from the files. The evidence did not show that Frenick openly and avowedly appropriated funds.

Frenick’s uncorroborated testimony also failed to establish a legal or factual basis for a good faith belief that she was entitled to the payments. Her self-serving claims that the payments were for overtime work or reimbursements amounted to no more than an assertion of a “vague right” to the funds. See Ager, 128 Wn.2d at 95. Frenick provided no details about her overtime during

the period in question or about specific reimbursements she was owed. She failed to offer any explanation of how it was possible for her to earn approximately \$35,000 in overtime in 2005, based on her overtime rate of \$23 per hour and in light of the fact that the vessel was in port in Seattle less than 30 days during that time.<sup>5</sup> The evidence presented by the State refuted Frenick's assertions that Seven Seas was owned by another company that controlled its budget and that she was paid with separate checks from the boat account for overtime she worked on the Stellar Sea.

Because the evidence was insufficient to meet Frenick's burden of proving the affirmative defense, she was not entitled to have the trial court instruct the jury on it. Thus, we cannot say that trial counsel was ineffective for failing to request the instruction. The evidence better supported the strategy that counsel did pursue: to attempt to convince the jury that Seven Seas insisted upon using an unorthodox method of paying her and then, upon learning that Frenick was cooperating with a government investigation, manipulated the accounting system to make it appear that the unorthodox payments were theft. See State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007) (failure to request instruction not ineffective unless (1) the court would have given the instruction if it had been requested, (2) failing to request the instruction was deficient, and (3) the failure to request the instruction prejudiced the defendant).

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<sup>5</sup> The State presented Frenick's final pay stub for 2004 indicating that she earned \$1,173 in overtime for the year and her penultimate pay stub for 2005 reflecting \$186 for overtime earned from January through May of 2005.



## PROSECUTORIAL MISCONDUCT

The testimony of Wigner, the ship's purser, was critical to the State's case. Wigner testified that the signatures on the checks were forged and explained Frenick's access to blank checks and the Stellar Sea's payroll accounts. Wigner also testified that she signed one of the checks to Frenick's attorney under false pretenses because Frenick told her it was an authorized payment on behalf of a vessel employee. Consistent with other State witnesses, Wigner confirmed that only hourly boat employees were paid out of the boat account, while office and management employees like Frenick were paid out of the Seven Seas' account.

Wigner's and Frenick's testimony coincided as to some issues, but there were critical areas of divergence. Frenick argues on appeal that the prosecutor engaged in misconduct because she asked Frenick if Wigner's testimony about certain procedures when the vessel came into port was "inaccurate." Frenick also contends it was misconduct for the State to ask Frenick if Wigner's testimony that only hourly employees who were physically on the boat were paid out of the boat account was "incorrect." Frenick objected once to this line of questioning, and her objection was overruled.

Frenick contends that the prosecutor improperly asked her to comment on the veracity or accuracy of another witness. Frenick contends that State v. Walden, 69 Wn. App. 183, 847 P.2d 956 (1993), is the controlling authority, rather than State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review

denied, 127 Wn.2d 1010 (1995), decided two years later.

In Walden, the prosecutor asked a witness whether another witness was “sorely mistaken” when he testified to a fact that was in direct conflict with her testimony. Walden, 69 Wn. App. at 184. The Walden court observed that while asking a witness if another witness is lying is “certainly more prejudicial than asking whether another witness is merely mistaken,” both types of questions are improper where “the questioning is designed to elicit testimony in the form of one witness’ opinion as to the credibility or veracity of another witness.” Walden, 69 Wn. App. at 186-87. In that case, the court concluded that counsel’s objections to the prosecutor’s questions should have been sustained, but because there was no substantial likelihood that the error affected the verdict, the error was harmless.

In Wright, the prosecutor asked the defendant about several discrepancies between his testimony and a police officer’s version of the same events and with respect to these differences, asked whether the officer “got it wrong.” Wright, 76 Wn. App. at 820. The Wright court acknowledged the Walden court’s determination that it is improper to ask a witness whether another witness is lying or mistaken, but observed that beyond invading the province of the jury, the “primary and more fundamental rationale” for disallowing both types of questioning is that what one witness thinks about the veracity of another witness is irrelevant and forcing a defendant to accuse another witness of lying potentially prejudices the defendant by placing him in a bad light.

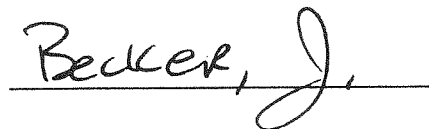
Wright, 76 Wn. App. at 821. The cross-examination of the defendant by the prosecutor in Wright “was not misconduct because the prosecutor did not ask Wright if the officers were lying.” Wright, 76 Wn. App. at 822. It was nevertheless objectionable because the testimony of Wright was completely at odds with the version of events testified to by the police officers. “Because there was nothing to clarify, the questions were irrelevant.” Wright, 76 Wn. App. at 822.

In our decision in Wright, we refined the rule set forth in Walden. Thus, we see Walden as a precursor to Wright. Contrary to the jurisprudential argument Frenick advances in her reply brief, both decisions are premised on the same principles; they are not irreconcilable. The prosecutor’s questions in this case were not misconduct under Walden because the prosecutor did not improperly ask Frenick to express her opinion on Wigner’s veracity or credibility, and they were not objectionable under Wright because they were helpful in sorting out the conflicting testimony. Where, as here, the jury is presented with testimony that is consistent on some points and differs on others, asking a witness whether another witness was incorrect or mistaken about some fact is not improper so as long as such questions are relevant and probative. Wright, 76 Wn. App. at 826. The cross-examination in this case was appropriately aimed at assisting the jury’s understanding of the material differences between Frenick’s and Wigner’s testimony and was not misconduct.

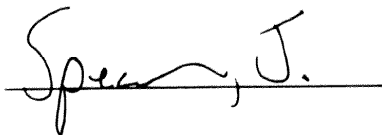
Lastly, Frenick challenges the court’s decision denying her posttrial

motion to substitute new counsel and continue the sentencing hearing to enable new counsel to prepare a motion for a new trial. The trial court denied the motion. The court was unpersuaded that any of the potential issues identified were meritorious and observed there had already been a significant amount of delay in the case, caused in part by the fact that Frenick had been represented by seven different attorneys during the course of the proceedings. Frenick provides no legal authority or reasoned analysis in support of her argument that the court's decision on the motion was error. This court generally will not consider claims not supported by citation to authority, references to the record, or meaningful analysis. RAP 10.3(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We decline to consider this argument further.

Affirmed.

A handwritten signature in cursive script that reads "Becker, J." is written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script that reads "Sperry, J." is written over a horizontal line.

*Appelwick J*