NO. 68725-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES BALLOU,

Appellant.

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

The Honorable Janet E. Ellis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by permitting the State to elicit testimony from a retail store manager that he had previously met the appellant, James E. Ballou.

2. The trial court erred by refusing to define "property."

Issues Pertaining to Assignments of Error

1. Did the trial court violate ER 404(b) by permitting the prosecutor to elicit testimony that the manager of a store that was victimized by a burglary had met Ballou before?

2. Did the trial court commit reversible error by failing to give the defense-proposed jury instruction defining "property" in a burglary trial involving a stolen empty cardboard box?

B. STATEMENT OF THE CASE

1. Pretrial motions and mistrial

The State charged James E. Ballou, Jr. with first degree theft and named Leonard Pegs, Jr. as his co-defendant. CP 324-25. The State later filed an amended information charging second degree burglary and first degree organized retail theft. CP 320-21. The trial court entered an order joining the cases for trial. Supp. CP __ (sub. no. 39, Order on Motion to Consolidate, filed 12/1/2011).

The defendants filed a joint motion to dismiss or suppress evidence based on a failure to preserve a Lynnwood Toys 'R Us store security video that purportedly depicted Ballou and Pegs acting in concert to steal merchandise from the store. 1RP 4-6, 134.[1] Counsel argued the State's failure to preserve the video evidence violated due process and required dismissal of the charges. 1RP 122, 134.

Ballou's counsel maintained the images contained in the video constituted material exculpatory evidence. 1RP 136-39. Alternatively, the video was at least potentially useful to the defense and Lynnwood Police Officer Justin Gann's failure to obtain the digital video recorder was so contrary to common sense and normal practice that it constituted bad faith. 1RP 139-41. Finally, counsel argued dismissal was warranted under CrR 8.3(b) because the failure to secure the video evidence was governmental misconduct that prejudiced the defense. 1RP 143-46.

The trial court found the Lynnwood Police Department erred by failing to get a court order to seize the recording device. 1RP 172. But the court found that when a third party rather than a State agent retains possession of evidence, the party seeking discovery must comply with CrR

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[1] The verbatim report of proceedings is cited as follows: 1RP – 12/2, 12/5, 12/7/2011; 2RP – 3/26/2012; 3RP – 3/27-29/2012; 4RP – 5/3/2012.

4.7. 1RP 172-73. The court also found the video evidence was not exculpatory. 1RP 173-74. Further, the court found an error in judgment does not equal bad faith. 1RP 174-75.

Finally, the court concluded CrR 8.3(b) did not apply because the State had no obligation to obtain evidence in the control of a third party. 1RP 175. The court denied the motion to dismiss. 1RP 175. It later entered written findings of fact and conclusions of law that reflected its oral declarations. CP 305-13.

The case proceeded to trial and ended in a mistrial because of juror misconduct. CP 250-51; 2RP 2-3.

2. Pretrial motions and second trial

After the mistrial, the State filed a second amended information charging Ballou and Pegs with second degree burglary. CP 167. The defendants jointly moved to suppress testimony regarding the contents of the missing surveillance video based on the confrontation clause of the Sixth Amendment and the best evidence rule. CP 296, 314-19; 3RP 37, 43-47. Ballou's counsel argued the inability to view the video prevented her from effectively cross-examining those witnesses who would testify to the contents of the video. 3RP 43-44.

After hearing argument, the trial court denied the motion. The court found that the State was not responsible for the failure to preserve the video and that its absence went to weight rather than admissibility of the testimony. 3RP 47-49.

A second defense motion was to reconsider an earlier denial of a motion to exclude reference to the Toys 'R Us manager's previous knowledge of Ballou under ERs 401-404(b). CP 289-91; 3RP 17-22. The trial court denied the motion, finding the evidence relevant as tending to show the manager was a credible witness. 3RP 21-22, 28-29.

The case again proceeded to a jury trial. Christopher Blaine was working at the Toys 'R Us and became suspicious of Ballou, so he notified store manager Darin Jorgensen. 3RP 82-86, 296-98. Jorgensen, who had met Ballou in the past, relayed the information to two other employees and asked them to watch Ballou. 3RP 86.

Ballou was near the edge of the "R Zone," a separate section of the store that contained electronics items. 3RP 87-88, 293-94, 298. Jorgensen observed Ballou, who appeared to be talking on the telephone and pacing around near the R Zone. 3RP 91-93, 98. The next thing Blaine and Jorgensen saw was Ballou pushing a shopping cart with a box in it toward

the store exit. 3RP 99-101, 300-02. Pegs appeared to accompany Ballou. 3RP 99, 301-02.

Jorgensen identified the box as a type that contained electronics gear. 3RP 100-01. Blaine, in contrast, called the box "generic." 3RP 336-37, 340. Jorgensen explained that such boxes were kept in a locked storeroom in the R Zone. 3RP 101-02.

Ballou and Pegs pushed the cart past the cashiers, disregarded Jorgensen's call to stop, and continued out the door. 3RP 106-07. As he followed them outside, Jorgensen dialed 911 and spoke with the operator. Ballou and Pegs put the box into the trunk of a black Jaguar. Jorgensen provided a description of the car and a license number to the 911 operator. The box appeared to be heavy, because it caused the car's suspension to shift. Ballou took the passenger's seat and Pegs climbed in and drove off. 3RP 107-11.

Officer Gann heard the dispatch and drove around in the area, but did not see the suspect Jaguar. 3RP 212-17. He turned around and on the way to the Toys 'R Us store, saw the Jaguar and stopped it without incident. 3RP 217-19, 248-50. The stop occurred within about seven minutes of the dispatch. 3RP 241. Ballou and Pegs were handcuffed and detained for investigation of theft. 3RP 220.

Another officer picked Jorgensen up at the store so he could view the detainees. Jorgensen told the officer he was "pretty sure" he could identify Ballou "without even being taken there to see them." 3RP 124. Jorgensen also spelled Ballou's name for the officer. 3RP 124. He identified the men Gann detained as the suspects he had seen in the store. 3RP 124-25, 220-22, 250-51.

Meanwhile, Blaine tried to determine where the box came from. 3RP 302, 321. To do that, he watched the store's security video surveillance footage. The footage showed Ballou talking with a store employee while Pegs approached the locked store room door. 3RP 302-03, 308-09. Pegs almost immediately opened the door and entered the room. 3RP 309-11.

A camera located inside the store room showed Pegs unload a box and replace the contents with Nintendo video game systems. 3RP 311-13, 322. Pegs periodically looked out through the door window and also appeared to be talking on his telephone. After about a minute, Pegs emerged from the store room, put the box on the floor outside the door, and walked away. 3RP 312-13, 322.

A couple minutes later, Ballou arrived with a cart and Pegs came back. Someone loaded the box onto the cart and Ballou pushed it toward the exit. 3RP 313-14, 322-26, 336.

When Jorgensen returned to the store, he, too, reviewed the security video. 3RP 111-12. It showed Ballou and Pegs enter the store and walk directly to the R Zone. 3RP 114-15. Ballou spoke with an employee, while Pegs approached the store room door. 3RP 116-17. Pegs appeared to turn or unscrew something. 3RP 114, 117, 153-54, 181-82. At one point he stopped, stepped back, and looked around. 3RP 183-85. He returned to the door and opened it within a few seconds. 3RP 117-18.

While inside the store room, Pegs dumped out the contents of a box and replaced it with Nintendo video games. He also paced about the room and appeared to be talking on a telephone or Bluetooth headpiece. 3RP 118-20. Ballou, meanwhile, was walking in and out of the R Zone, speaking on his phone. 3RP 120-21.

Shortly thereafter, the video showed Ballou appear with a shopping cart, which he pushed to the store room door. 3RP 121-22. Pegs opened the door and heaved the box into the cart. 3RP 122, 344-45. Pegs headed toward the store exit, and Ballou followed behind while pushing the cart. 3RP 122-23.

Officer Gann also watched parts of the video. 3RP 223-24. It showed Pegs doing something with the store room door handle, walking away, returning to the handle, and opening the door. Pegs unloaded a box of merchandise and replaced it with items on a shelf. 3RP 225-27, 271-74. Gann observed enough of Pegs' face on the video to confirm Jorgensen's identification. 3RP 283-84, 287.

As per customary police practice, Gann asked Jorgensen for a copy of the video. 3RP 227-30, 281. Gann said the video evidence was critical and essential to the case. 3RP 269. Jorgensen tried to make a copy but the machine did not work properly. 3RP 227-28. Gann emphasized the need for the copy, and told Jorgensen to let him know when it became available. 3RP 228. He called Jorgensen the next day for a copy of the video, but learned there was something wrong with the recording system. 3RP 228. Gann never received a copy of the video. 3RP 228.

Jorgensen testified the disk drive on the video recorder was stuck closed, so he could not burn a copy to disk. 3RP 134. When a service person looked at the recorder about a week later, he said the machine needed to be replaced. 3RP 136. The recorder was replaced within a month or two. 3RP 137. Jorgensen did not offer to allow the police to

take the machine because it was frequently used for training and fraud purposes. 3RP 137.

Gann had the Jaguar impounded after the detention. 3RP 222. He obtained a warrant and searched the car the following day, including the box in the trunk. The box was empty. 3RP 239, 250. No effort was made to find the purported contents, which cost the store more than $5,700. 3RP 131-32.

The defendants proposed a jury instruction defining "property" as "anything of value." WPIC 2.21; 3RP 392-96. Counsel argued if someone went into a room intending to take something he believed had no value, he did not have the intent to commit a crime therein. 3RP 392. Counsel anticipated "significant argument exactly on this point from all three counsel[.]" 3RP 393.

The trial court refused to give the instruction, finding the term "property" is within the common understanding of the jury. 3RP 395. Both defense counsel excepted to the court's refusal. 3RP 396-97.

As counsel predicted, the issue came up in closing arguments. The prosecutor argued the defendants "didn't have permission to take this box or what was filled up inside of it." 3RP 403.

The prosecutor contended the State had to prove Pegs "entered that storage room with the intent to commit the crime of theft, to steal something." 3RP 410. Continuing, the prosecutor argued:

> He did. DSs, he did.[2] The box. It doesn't matter what it is. If he entered there to take one DS, that's the intent to commit the crime of theft. If he went in there to just take this box that he didn't have permission to take . . . that's enough. They had the intent to go in that storage room and to commit theft.
>
> But the reality is, it wasn't just this box. They went in to take those DSs . . . .

3RP 410-11.

The prosecutor summarized his closing argument with the following:

> Instruction 14 helps you with theft. It says theft means to take wrongfully the property of another with intent to deprive that owner of that property. That was their intent, to take the DSs . . . . Intent to steal, theft, this box, no permission to do so. Same intent as taking the DSs. And there's no question about they walked out with this box. They stuck it in that car and the police arrested them with it.

3RP 412.

On rebuttal, the prosecutor made the following statement:

> I'm not going to argue that they came into this Toys R Us with the intent to steal a box. That doesn't make sense, right? Once they got in there they actually stole it also and intended to steal it to carry the NDS equipment. So by itself the intent is

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[2] A "DS" is a particular model of Nintendo hand-held video game console. 3RP 105, 119, 129-32, 311-12, 333-34.

adequate just by taking the box. But it was taking the DSs. . . . And they were missing, they were missing from the storeroom.

3RP 482.

After hearing the above evidence and argument, a Snohomish County jury found Ballou and Pegs guilty as charged. CP 124. The trial court imposed a standard range sentence. CP 15-25; 3RP 35.

C. ARGUMENT

1. THE TRIAL COURT ERRED UNDER ER 404(b) BY ALLOWING JORGENSEN TO TESTIFY HE HAD MET BALLOU BEFORE.

Over objection, the trial court permitted Jorgensen to testify he had met Ballou in the past. 3RP 16-29, 86. The court made this ruling despite learning three or four jurors from the first trial expressed concern about the nature of the earlier contact. 3RP 19, 26. Furthermore, identity was not at issue. 3RP 19-21. Under these circumstances, the trial court improperly invited jurors to speculate Jorgensen knew Ballou because of prior misconduct, thereby violating ER 404(b).

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

The purpose of ER 404(b) is to prevent consideration of prior bad acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The court abused its discretion in Ballou's case.

Before admitting evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is whether the evidence is relevant and necessary to prove an element of the charged crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is logically relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential

prejudice.[3] Saltarelli, 98 Wn.2d at 362-63. "Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs it prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995).

In a doubtful case, [t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). The State's burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404 (b) is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

Evidence of prior misconduct is admissible to prove identity only if identity is actually at issue. State v. Mutchler, 53 Wn. App. 898, 902-03, 771 P.2d 1168, review denied, 113 Wn.2d 1002 (1989). Moreover, to be admissible under ER 404(b), the prior misconduct must link the defendant to the crime charged. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005).

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[3] Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."

Jorgensen's testimony did neither here. As stated, identity was not at issue. See Sanford, 128 Wn. App. at 287 (because Sanford admitted he had been in altercation with complainant, "his identity was not in issue at trial, and the booking photo was totally unnecessary to link Sanford with the charged assault.").

Second, Jorgensen's knowledge of Ballou did not connect him with the incident at Toys 'R Us. Not properly, anyway: jurors would likely have drawn an inference that a store manager knew Ballou because he was a "criminal type." See State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (gang evidence portrayed Ra and companions as inherently bad persons, therefore inviting jury to make the "'forbidden inference'" underlying ER 404(b) that Ra's prior bad acts showed his propensity to commit the crimes charged), review denied, 164 Wn.2d 1016 (2008).

The trial court found the evidence relevant essentially because it bolstered Jorgensen's credibility regarding his recognition of Ballou. With respect to credibility, prior bad act evidence is particularly relevant "when the circumstances of the alleged crime create difficulty in assessing the credibility and memory of the complaining witness." State v. Baker, 89 Wn. App. 726, 734, 950 P.2d 486, 490 (1997), review denied, 135 Wn.2d 1011 (1998). For example, the court in Lough found evidence that the

defendant drugged and raped four other women was particularly relevant because of the complaining witness's dizziness and faulty memory with respect to the charged rape. 125 Wn.2d at 861.

There were no circumstances of Ballou's alleged crime, however, that would have caused jurors difficulty in evaluating Jorgensen's credibility and memory. Instead, Jorgensen was at work and supervising employees as he normally did when he saw Ballou in the store. Especially where identity was not at issue, evidence that Jorgensen had met Ballou before had little if any probative value as tending to show a burglary occurred.

Furthermore, "[w]here evidence is used to assess credibility rather than used to prove the act was done under ER 404(b), the evidence is certainly less relevant and should weigh significantly less in the trial court's balancing test." State v. Magers, 164 Wn.2d 174, 197, 189 P.3d 126 (2008) (Johnson, C., J., dissenting).

What little probative value the evidence had here did not outweigh its prejudicial effect. The trial court did not balance the probative value of the evidence against its prejudicial effect. Instead, the court simply found, "And the fact that he recognized Mr. Ballou has probative value. So I will allow that testimony." 3RP 28.

"Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). Failure to engage in this balancing process is error. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996).

The error may nevertheless be found harmless if (1) the record is sufficient for this court to determine that the trial court would have admitted the evidence after a proper balancing; or (2) this Court can conclude the verdict would have been the same even without the evidence. Id., 82 Wn. App. at 686-87.

The State cannot satisfy the test here. First, the record does not show the trial court would have admitted Jorgensen's testimony after proper balancing. This case is very unusual in that, on the prejudice side of the scale lay the weighty admission from three or four jurors from the first trial that they inferred the previous contact between Jorgensen and Ballou had been negative. 3RP 26. Given that inference, it would hardly be a stretch to believe those jurors would be more likely to believe Ballou committed a crime at the store than did not commit a crime. When considering the minimal probative value of the evidence, it cannot be said the trial court would have admitted the evidence.

Nor would the outcome of the trial been the same without the evidence. The State did not have a strong case. There was no videotape footage to support the testimony of Jorgensen, Blaine, and Gann. Nor was there physical evidence, such as fingerprints inside the store room or pry marks on the door, which would have established Pegs' presence inside the store room. Blaine admitted he had seen people leave the store room door open when they were not supposed to. 3RP 319. Further, although Gann's stop of the Jaguar occurred within about seven minutes of the dispatch, 3RP 241, the box was empty when he looked inside and the allegedly stolen goods were not recovered.

Given the weaknesses in the State's proof, admission of Jorgensen's testimony was not harmless. Jorgensen not only told the jury he had met Ballou before, but also testified he told an officer he was "pretty sure" he could identify Ballou "without even being taken there to see them." 3RP 124. Jorgensen also spelled Ballou's name for the officer. 3RP 124. This testimony was unfairly prejudicial, and this Court should reverse Ballou's conviction and remand for a new trial.

2. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE DEFENSE PROPOSED INSTRUCTION DEFINING "PROPERTY."

As charged and instructed, the State had to prove Ballou or an accomplice entered or remained unlawfully with the intent to commit theft. CP 141 (instruction 13). "Theft" was defined as wrongfully taking "*the property of another* with intent to deprive the owner of such property." CP 142 (instruction 14) (emphasis added).[4] "Property" is defined as "anything of value[.]" RCW 9A.04.110(22); WPIC 2.21. The definition of property was important because Gann found only an empty cardboard box inside the trunk and because the prosecutor argued intent to steal the box alone was sufficient. Under these circumstances, the trial court erred by refusing to give the defense instruction defining property.

"Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Failing to instruct on the defense theory is reversible error where there is evidence to support the theory. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

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[4] "'Theft' means 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.56.020(1)(a).

Ballou's defense theory was that the State's evidence did not prove burglary. Consistent with this theory, Ballou's counsel during closing argument provided the jury with the "top ten reasons to doubt[,]" the first of which was the fact of the "magic disappearing DSs." 3RP 444. More specifically, counsel challenged the prosecutor's claims that intent to steal the box was enough to sustain a guilty verdict:

> The problem for the State is that their case conflicts with itself. Eyewitness testimony conflicts with the empty box found seven minutes after the 911 call. Nothing was stolen. There's no evidence a crime occurred. And really, floating the theory that if it was just a box it's a burglary? Really?

3RP 441-42.

Counsel essentially contended the State failed to prove Ballou intended to commit theft in the store because an empty generic cardboard box was not "property" since it had no value. But because the trial court refused to give the defense instruction, the jury did not know this and counsel's argument became meaningless.

There was evidence for a reasonable juror to conclude the box taken from the store had no value. Jorgensen testified that when they are emptied, the boxes are broken down, compacted, and discarded. 3RP 138-39, 174-75. Boxes are crushed at least daily, in an unlocked room near the compactor. 3RP 175-76. On "truck days," Jorgensen explained, the store

receives upwards of 1,600 boxes. 3RP 138-39. Jorgensen routinely gave away empty boxes to customers upon request. Id.

There was also evidence to support a conclusion that Ballou and Pegs took nothing more than an empty box. The only evidence that Pegs filled the box with merchandise came from the storeroom surveillance camera and resulting destroyed video. The absence of the video required the jury to take the word of the store employees and arresting officer as the true description of the video images. Under the circumstances, a reasonable juror would likely have been uncomfortable doing that.

Furthermore, the State's theory was that the defendants dumped the contents of the box before being stopped within minutes of driving out of Jorgensen's sight. 3RP 401.[5] Yet no one attempted to look for the merchandise purportedly removed by Ballou and Pegs.

In addition, Gann drove his fully marked police car past Pegs' car in the opposite direction. 3RP 212, 217-18. Yet Pegs' car traveled normally and within the speed limit. 3RP 248. Gann turned around, activated his flashing lights, and caught up to the car. 3RP 218. Pegs responded appropriately by pulling over in the first available spot. 3RP

[5] Officer Gann testified about seven minutes elapsed between the dispatch and the stop. 3RP 241.

248-49. In short, Pegs drove in a manner suggesting he believed his conduct at the store was not improper.

There was, therefore, evidence to support Ballou's theory that there was no intent to take the *property* of another. The trial court erred by refusing to give the instructing defining "property."

Instructional errors are presumed prejudicial. State v. Weaville, 162 Wn. App. 801, 815, 256 P.3d 426, review denied, 173 Wn. 2d 1004 (2011). To find an instructional error harmless, this Court must conclude beyond a reasonable doubt that the verdict would have been the same without the error. State v. Ponce, 166 Wn. App. 409, 420, 269 P.3d 408 (2012).

The State cannot overcome the presumption in Ballou's case. The box was central to the case, as the prosecutor illustrated during closing argument. Nor is there any question it was taken: Jorgensen saw it leave the store and go into the trunk with his own eyes. A cardboard box certainly meets the common, dictionary definition of "property:" "something that is or may be owned or possessed." Webster's Third New International Dictionary 1818 (1993). Once emptied, however, store personnel did not treat a box as having *value*. There was no evidence

anyone paid anything for the compacted and discarded boxes. Indeed, Jorgensen routinely gave empty boxes away.

Given the rather unique nature of a standard cardboard box, this Court cannot say beyond a reasonable doubt that no reasonable juror would have concluded the empty box was property without value. The trial court's refusal to give the submitted definition of "property" was not harmless, and Ballou's conviction should be reversed.

D. CONCLUSION

For the aforesaid reasons, this Court should reverse the conviction and remand for a new trial.

DATED this 16 day of November, 2012.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON/DSHS,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68725-5-I
	)	
JAMES BALLOU,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF NOVEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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EVERETT, WA 98201

[X] JAMES BALLOU
DOC NO. 777637
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF NOVEMBER 2012.

x Patrick Mayovsky