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No. 68725-5
Snohomish County No. 11-1-00008-1

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

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

LEONARD PEGS, JR.,
Defendant-Appellant.

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

The Honorable Janet E. Ellis, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

I.
ASSIGNMENTS OF ERROR

1. The trial court erred in permitting any witness to testify that the person depicted in the missing store security video was Pegs.
2. The trial court erred in failing to dismiss the charges under the Fourteenth Amendment when the investigating officers failed to preserve the store's security video – the only evidence that Pegs entered or remained unlawfully in the store's stock room.
3. The trial court erred in failing to exclude the witnesses' testimony about what they saw on a videotape that had been destroyed well before trial and had never been available for the defendant or his counsel to review.
4. The trial court erred in permitting store employee Jorgensen from testifying that he met co-defendant Ballou previous to his arrest on these charges.
5. The trial court erred in failing to instruct the jury on the definition of "property."
6. The trial court abused its discretion in failing to enter a sentence pursuant to the Family and Offender Sentencing Alternative [FOSA].

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the only evidence that Pegs entered the Toys 'R Us storeroom was a security video, and where the security video was not produced at trial, did the trial court err in permitting witnesses, who had never seen Pegs before, testify that he was observed on the security video?
2. Did the trial court err in failing to dismiss the charges under the Fourteenth Amendment when the investigating officer failed to preserve the store's security video – the only evidence that Pegs entered or remained unlawfully in the store's stock room?
3. Did the trial court err in failing to exclude the witnesses' testimony under ER 1002 about what they saw on the store's security video tape that was not produced at trial and had never been available for Pegs or his counsel to review?
4. Did the trial court err in permitting store employee Jorgensen to testify that he met co-defendant Ballou previous to his arrest on these charges?
5. Did the trial court err in failing to instruct the jury on the definition of "property" as provided for in the Washington Pattern Jury Instructions?

6. Did the trial court abuse its discretion in failing to enter a sentence pursuant to the Family and Offender Sentencing Alternative [FOSA] when she found that Pegs qualified under the statutory criteria but had failed to demonstrate "extraordinary" circumstances?

III.
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Leonard Pegs and James E. Ballou, Jr. with first degree theft and named Leonard Pegs, Jr. as his co-defendant. CP 208-09. The State later filed an amended information charging second degree burglary and first degree organized retail theft. CP 111-12. The case proceeded to trial and ended in a mistrial because of juror misconduct. 2RP 2-3. Before the second trial the State filed a second amended information charging only second degree burglary. CP 109-110.

B. PRETRIAL MOTIONS

The State's case against Pegs was based, not on what the witnesses actually observed, but rather on their review of a store security video. But by the time of trial, it was clear that the video was no longer available. Thus, prior to both trials, Pegs moved to dismiss the prosecution on the grounds that the destruction, loss or failure to preserve the videotape violated the Fourteenth Amendment. CP 144-153. He also

moved to dismiss under CrR 8.3 citing governmental misconduct in the investigation. CP 153-155. In the alternative he argued, citing *State v. Turnispeed*, 162 Wn. App. 60, 255 P.3d 843, *review denied*, 172 Wn.2d 1023, 268 P.3d 225 (2011), that witnesses should be precluded from testifying about what they saw on the video because he could not confront and cross-examine the witnesses on any misperceptions they might have made. CP 113. He moved to suppress any identification the clerks might make of him under ER 701 and the decision in *State v. George*, 150 Wn. App. 110, 118, 206 P.3d 697, *review denied*, 166 Wn.2d 1037, 217 P.3d 783 (2009), quoting *United States v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). CP 136. Finally, he moved to exclude the witnesses' testimony because the videotape was the "best evidence." CP 188. *See also* 1RP at 1-3.[1]

Before the first trial, the judge heard evidence from Deputy Justin Gann and store personnel Darin Jorgensen, Christopher Blaine and Kathy Hudgins. Their testimony regarding the store theft are discussed more fully below, but as to Pegs it was clear from the pretrial hearing that the only evidence that Gann, Jorgenson and Blaine had that would place Pegs in an area of the store not open to the public was a videotape. In fact,

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[1] Pegs adopts the verbatim report of proceedings as cited by Ballou: 1RP – 12/2, 12/5, 12/7/2011; 2RP – 3/26/2012; 3RP – 3/27-29/2012; and 4RP – 5/3/2012.

Jorgensen said that he had watched the video 30 times. He said that on a number of occasions he watched the video with witnesses Blaine and Hudgins. 3RP 113. Despite the number of times he had watched the video, he stated several times that he could not remember certain details because too much time had gone by.

As per customary police practice, Gann asked Jorgensen for a copy of the video. 1RP 1-36; 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. 1RP 67, 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. 1RP 59-79; 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.

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 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.

Pegs renewed these motions before the second trial. The new trial judge concluded that:

> The fact that the video is not available the Court determines is a matter of weight, not admissibility, and the court will allow it.

2RP 10.

C. 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. 3 RP 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 storeroom 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 storeroom, 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 storeroom 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 storeroom 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's face on the video to confirm Jorgensen's identification. 3RP 283-84, 287.

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

3RP 482.

D. SENTENCING

Prior to the sentencing Pegs was evaluated for eligibility under the Family and Offender Sentencing Alternative Act (FOSA). RCW 9.94A.655. The eligibility determination was performed by Denise Hollenbeck, an Everett Community Corrections Officer. After an extensive investigation, she determined that Pegs was eligible and a "reasonable candidate" for the sentencing alternative. She also recommended that while on a FOSA sentence Pegs consent to weekly home visits, agree to continue to work full time, attend Partners in Parenting and attend Moral Recognition Therapy. Supp. C.P. ____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12.

The evaluation began by acknowledging that Pegs had a significant criminal history and had been committed to prison in 2006. He admitted his prior criminal conduct but stated that his prison sentence convinced him to change his life. His most recent offense was one misdemeanor –

stemming from a mutual argument at work. Supp. C.P. _____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12.

But Pegs had a very chaotic childhood. His family moved frequently and he attended five different high schools during his freshman year. He never knew his biological father who died when Pegs was 14.

At age 22, he and his girlfriend Rachelle Conner had a son, Devanté, now age 17. At the time of the offense Pegs had actual physical custody of Devanté. Ms. Conner reported that Pegs had always been a factor in Devanté's life and that their son "needs his dad's influence." When Pegs was previously in prison, Devanté was

> Very confused and had to attend counseling. He did not want to attend school. He also began hanging out with the wrong people and getting into trouble. It took a lot to get him back on track and for him and his father to fix their relationship.

Supp. C.P. _____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12.

According to Conner, in 2008, Pegs moved to Edmonds in order to be close to Devanté. Devanté had lived with Pegs for extended periods. She is very worried about what she will do if Pegs is sentenced to prison. Conner also stated that her two other children also consider Pegs a father figure. She stated: "I have known Leonard for over twenty years and in the last five years or so he has tried to turn his life around." She stated

that Pegs worked hard and spent his spare time with his children. Supp. C.P. _____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12.

Conner opined if Pegs went to prison, not only would it harm the children emotionally, it would harm them economically. For example, Pegs's job meant that Devanté had medical insurance.

In 2011 Pegs and his current partner, Lupe Zamudio, had a daughter Adrianna. Adrianna suffers from achondroplasia, a form of dwarfism, and many other medical conditions. Adrianna's doctor at Children's Orthopedic Hospital confirmed that Pegs

> . . . consistently attends her clinic evaluations and is very involved in her care. It would be a hardship for her mother if he was not available to them for an extended period of time.

Supp. C.P. _____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12.

Lupe also stated that she suffered from Lupus. The disease makes her exhausted, weak and in need of constant medical attention. Her doctor confirms this diagnosis. She stated that she depends upon Pegs to help her, not only with caring for Adrianna but also with taking care of her.

At the time of sentencing Pegs was working full time selling cars and making a very good salary. That salary permitted Pegs to pay his child

support for Devanté, as well as his portion of the cost of raising Adrianna, a special needs child. His employer wrote a glowing letter of recommendation. The general manager of the Auto Center appeared in person at sentencing and attested to Pegs's successful efforts at work.

At sentencing, the State opposed Pegs's request for a FOSA sentence. The State argued that FOSA was only for parents who had physical custody of the child. Although the State had not presented any evidence challenging the extensive documentation supplied by the DOC and Pegs, it argued that there was no proof that Pegs supported his children. 4RP 8. The State speculated that Pegs had been forced to pay support for Devanté because Pegs had not provided some sort of proof to the contrary. Indeed, the State said "there's probably public assistance being paid." *Id.* The State also argued that because Pegs's co-defendant did not seek a FOSA sentence, it would not be fair to consider one for Pegs. 4 RP 10.

At the conclusion of the sentencing hearing, this Court stated:

> Mr. Pegs, while you meet the statutory criteria for a parenting sentencing alternative, I will note that it is a new statute in that sense that it was passed into law in 2010, but I believe there are only 17 people in the entire state of Washington that have received a parenting sentencing alternative. It is an extraordinarily rare sentence to receive. The fact is I think reflective of some of the policy that the legislature was trying to embrace when it passed this as a sentencing alternative to balance, if you will, under certain

> very extraordinary cases the needs of accountability under the Sentencing Reform Act to the needs of an offender who has young family and may in fact be the only parent available to parent.
>
> . . . I simply will not authorize a parent sentencing alternative sentence for Mr. Pegs.

4RP 33.

The judge sentenced Pegs to 51 months in prison. 4RP 35; CP 14-24. She later stayed the sentencing pending this appeal.

IV.
ARGUMENT

A. THE TRIAL COURT ERRED IN PERMITTING ANY OF THE WITNESSES TO OPINE THAT IT WAS PEGS WHO WAS DEPICTED IN THE STORE SECURITY VIDEO

In this case, Pegs's burglary conviction hinged on whether or not he had entered the Toys 'R Us storeroom where video games were located. The only evidence that he entered the storeroom was the evidence on that security tape. Absent that evidence, the State could not prove that Pegs entered the store with the intent to commit a crime or that he entered any part of the store other than that open to the public.

A lay witness may give opinion testimony as to the identity of a person in a photograph as long as "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *State v. Hardy*, 76 Wn. App. 188, 190-91,

884 P.2d 8 (1994), *review granted*, 126 Wn.2d 1008, 892 P.2d 1088 (1995), *affirmed by State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996) (citations omitted). Opinion testimony identifying individuals in a surveillance photo runs "the risk of invading the province of the jury and unfairly prejudicing [the defendant]." *La Pierre*, 998 F.2d at 1465 (finding that officer's identification testimony was not helpful to the jury because the officer had never seen the defendant in person). Such opinion testimony may be appropriate, however, when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph. *See La Pierre*, 998 F.2d at 1465. For example, in the two consolidated cases at issue in *Hardy*, officers testified to the identities of the defendants shown in videos of drug transactions. 76 Wn. App. at 190-92. In one case, the officer testified he had known the defendant for several years. *Id.* at 191. In the other case, the officer testified that he had known the defendant for six or seven years. *Id.* at 192. The Appellate court affirmed the trial court's finding that the officers were more likely to correctly identify the defendants than were the juries. *Id.*

In the consolidated case of *State v. George, supra*, the State charged Lionel George and Brian Wahsise with the theft of a flat-screen television from a Days Inn. Employees of the Inn reported seeing multiple

suspects leave the scene in a red van. A similar van was later spotted and stopped by police. *Id.* at 112-13.

Detective Jeff Rackley testified at trial that he observed George as he exited the van and ran away and at the hospital later that evening. *Id.* at 115, 119. Rackley testified that he also observed Wahsise when Wahsise exited the van and was handcuffed and while Wahsise was at the police station in an interview room. *Id.* The State introduced a poor-quality surveillance video taken at the Days Inn during the incident, and Rackley identified two of the men in the video as George and Wahsise. *Id.*

> On appeal, George and Wahsise challenged the trial court's decision to allow Rackley's identification testimony. *George*, 150 Wn. App. at 117. This Court agreed with the appellants, finding that:
>
> These contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality video. We hold that the trial court erred in allowing Rackley to express his opinion that George and Wahsise were the robbers shown on the video.

Id. at 117.

After determining that Rackley's identification testimony was improper, the *George* court then addressed whether the error was prejudicial. The court found that, as to appellant George, it was not;

> [The victim] identified George as the gunman in the robbery. George was driving the red van with the stolen television set. He initially failed to stop for the police and

> then, after the first stop, drove off again. He also fled on foot after exiting the van. Finally, Huynh described the gunman as a heavyset man; according to the booking information, George was 5'11" and weighed 280 pounds. We are satisfied that Rackley's improper testimony did not affect the jury's verdict.

George, 150 Wn. App. at 119-20.

However, the Court found that the error was not harmless as to Wahsise:

> [Other than the gunman, the victim] could not identify [any] of the men who took the television set. And no physical evidence linked Wahsise to the robbery. [A]ccording to the State, Wahsise fit the general physical description of one of the men who took the television . . . Finally, the other van occupants can be eliminated, according to the State, because at least one was a woman and the other men were so intoxicated they had difficulty exiting the van and walking. We conclude that this evidence is not sufficient for us to find Rackley's testimony harmless error as to Wahsise[.]

George, 150 Wn. App. at 120.

This case presents facts more egregious than those discussed in *Hardy* and *George*. Here, none of the witnesses had ever seen Pegs before. Thus, they did not have sufficient experience to identify him from the videotape. Moreover, unlike *Hardy* and *George*, the videotape had been destroyed. Thus, defense counsel could not effectively cross-examine the witnesses regarding their identification of Pegs as the person who entered the storeroom.

B. THE STATE'S FAILURE TO PRESERVE MATERIAL EXCULPATORY EVIDENCE VIOLATED PEGS'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Under the Fourteenth Amendment's due process clause, criminal prosecutions "must comport with prevailing notions of fundamental fairness," and a defendant must have a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Fundamental fairness requires that the government preserve and disclose to the defense favorable evidence that is material to guilt or punishment. *Id.* at 480, 488; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Due process is violated when the State fails to preserve material, exculpatory evidence, but when the evidence the State destroys is only "potentially useful," due process is not violated unless the defendant can demonstrate the police acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S.Ct. 333, 102 L.Ed.2d.281 (1988), *reh'g denied*, 488 U.S. 1051, 109 S.Ct. 885, 102 L.Ed.2d 1007 (1989); *Illinois v. Fisher*, 540 U.S. 544, 547-48, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004) (per curiam); *Olszewski v. Spencer*, 466 F.3d 47, 56-57 (1st Cir. 2006), *cert. denied*, 550 U.S. 911, 127 S.Ct. 2114, 167 L.Ed.2d 827 (2007). Evidence is considered material if it possesses an exculpatory value that was apparent before the evidence was lost or destroyed and if the defendant would be unable to obtain

comparable evidence if the evidence were destroyed. *Trombetta*, 467 U.S. at 489.

In this case, the State allowed the loss or destruction of the only evidence that Pegs had committed a burglary. Pegs maintained his innocence. Thus, the only exculpatory or even inculpatory evidence was gone.

If this Court concludes the destroyed evidence was not demonstratively material exculpatory evidence, it must then review the trial court's conclusion that the State did not act in bad faith in destroying evidence potentially material to Pegs's defense. When potentially useful evidence is destroyed by the government, the defendant's right to due process is violated if the government acted in bad faith. *Youngblood*, 488 U.S. at 58.

Obviously, it is difficult for the accused to prove bad faith on the part of the government. *Youngblood*, 488 U.S. at 66-67 (Blackman, J., dissenting); *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992); Norman C. Bay, *Old Blood, Bad Blood and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 Wash. U.L.Rev. 241, 291-92 (2008). But the sheriff department's violation of its own protocols and directions from the investigating detectives is bad faith.

Courts of this State have found an absence of bad faith when a government agency follows its own protocols in destroying evidence of a crime. *State v. Wittenbarger,* 124 Wn.2d 467, 477-79, 880 P.2d 517 (1994) (defendants conceded State acted in compliance with established policy; courts rejects defendants' policy adopted in bad faith); *State v. Ortiz*, 119 Wn.2d 294, 302, 831 P.2d 1060 (1992) (State did not act in bad faith when state handled samples in "its usual manner"). Logically, then, a law enforcement agency's destruction of evidence in violation of its own policies demonstrates bad faith. *See United States v. Montgomery*, 676 F.Supp.2d 1218, 1244 (D.Kan. 2009) (granting habeas petition where defense counsel failed to move to dismiss prosecution for possession of 100 or more marijuana plants with intent to distribute when government destroyed marijuana plants without photographing or videotaping the plants, thus violating DEA protocol); *United States v. Elliott*, 83 F.Supp.2d 637, 647 (E.D.Va. 1999) ("[T]he failure to follow established procedures is probative evidence of bad faith, particularly when the procedures are clear and unambiguous as the regulations upon which the government relies on here.").

This was the conclusion of the Ohio appellate court in driving while under the influence of alcohol prosecution where a state trooper destroyed a videotape showing the defendant prior to a traffic stop and

while performing field sobriety tests. *State v. Durnwald*, 163 Ohio App.3d 361, 837 N.E.2d 1234 (2005). The State claimed the videotape had been erased and taped over when highway patrol cadets were given unsupervised access to the trooper's vehicle during a training session. 837 N.E.2d at 1238, 1241. The Ohio State Highway Patrol policy, however, required all traffic stops, pursuits, and crash scenes be recorded and the recordings preserved until all criminal and civil proceedings were over. *Id.* at 1241. The appellate court found the erasure of the tape, while perhaps not intentional, was "more than mere negligence" because preservation of the videotape was required by the highway patrol regulations and therefore dismissed the prosecution. *Id.* at 1241-42.

Here, the trial judge made a finding that the officer should have preserved the tape. Thus, even if the evidence was only potentially exculpatory, Pegs's right to due process was violated. The State acted in bad faith when it made only one follow-up call to Toys 'R Us, waited 14 months to charge Pegs and had no other evidence that Pegs entered the off-limits area of the store.

C. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE THE WITNESSES' TESTIMONY THAT WAS BASED SOLELY ON THE MISSING VIDEOTAPE

The best evidence rule provides that the original of a "writing, recording, or photograph" is required to prove the contents thereof. ER

1002. A writing or recording includes a "mechanical or electronic recording" or "other form of data compilation." ER 1001(1). Photographs include "still photographs, X-ray films, video tapes, and motion pictures." ER 1001(2). An original is the writing or recording itself, a negative or print of a photograph or, "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately." ER 1001(3).

Where the rule applies, the proponent must produce the original (or a duplicate, *see* ER 1003) or explain its absence. ER 1002, 1004. The rule's application turns on "whether contents are sought to be proved." ER 1002. The rule does apply when a witness seeks to testify about the contents of a writing, recording or photograph without producing the physical item itself – particularly when the witness was not privy to the events those contents describe.

It is important to keep in mind that none of the witnesses who testified to the content of the videotape actually observed Pegs in the off-limits storage room. Similarly, none of them saw Pegs take the videogames. Thus, this is not a case where the witnesses actually saw events that were being simultaneously taped. Rather, the only evidence of the crime was on the missing video. Where a witness's testimony is the evidence at issue, the key to whether the rule applies is whether the

witness has personal knowledge of the matter that exists independent of the recording. *See id.* If so, the evidence does not violate the rule.

In *Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993), the court considered a virtually identical set of facts. In that case the defendant was charged with shoplifting a Walkman from a Sears store. The trial court permitted the police officer, who had not witnessed the crime, to testify to his observations from a security video. The appellate court reversed:

> We find that the facts in the instant case present the same type of circumstances which the best evidence rule was designed to guard against: a witness is attempting to testify regarding the contents of a videotape when the tape itself has not been admitted into evidence. The need to secure the original evidence itself, in order to insure that the contents of the evidence be given the proper weight, is apparent in this case. Thus, the best evidence rule should apply, in order to prevent any mistransmission of the facts surrounding Appellant's acts in the Sears store which might mislead the jury

Id. at 358.

In *United States v. Bennett*, 363 F.3d 947 (9th Cir.), *cert. denied*, 543 U.S. 950, 125 S.Ct. 363, 160 L.Ed.2d 268 (2004), the Ninth Circuit reversed a conviction where a police witness was allowed to testify to a computer generated global positioning system (GPS) display he had observed without the display being produced in court. The Court stated:

> Proffering testimony about Bennett's bordercrossing instead of introducing the GPS data, therefore, was

> analogous to proffering testimony describing security camera footage of an event to prove the facts of the event instead of introducing the footage itself.

Id. at 953. The Court held that the best evidence rule had been violated finding such testimony to be insufficiently reliable as a matter of law. *Id.* at 954.

It is true that testimony that violates the rule is admissible if the recording is shown to be unavailable for some reason other than the loss or destruction of the originals by the proponent in bad faith. ER 1004(a). But, as argued above, the destruction here was a direct result of the officer failing to follow his department's guidelines for handling evidence. Moreover, he made only one attempt to get a copy of the video. For these reasons it was error for the trial court to permit the witnesses to testify about what they observed on the video.

D. THE TRIAL COURT ERRED IN PERMITTING EMPLOYEE JORGENSEN TO TESTIFY THAT HE MET CO-DEFENDANT BALLOU IN THE PAST AND THIS ADMISSION WAS PREJUDICIAL TO PEGS

Over objection, the trial court permitted Jorgensen to testify he met Ballou in the past. 3RP 16-29, 86. The court made this ruling despite learning that 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 that 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 admitting this evidence and its admission was prejudicial to Pegs'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. *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); *Bennett*, 36 Wn. App. at 180. 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, 777 P.2d 1050 (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).

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. Its purpose was to encourage the jury to draw 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, *review denied*, 164 Wn.2d 1016, 195 P.3d 88 (2008) (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). And, in doing so, the jury was also likely to infer that if Ballou was friends with Pegs, Pegs must be guilty "by association."

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, 960 P.2d 939 (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 that 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 storeroom or pry marks on the door, which would have established Pegs's presence inside the storeroom. Blaine admitted he had seen people leave the storeroom 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.

E. THE TRIAL COURT ERRED IN FAILING TO GIVE THE PROPOSED JURY 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). "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).

The defense was that the State's evidence did not prove burglary. Co-defendant's counsel argued that:

> 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 any intent 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. 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's car in the opposite direction. 3RP 212, 217-18. Yet Pegs's 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 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 instruction 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, 268 P.3d 942 (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. 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 Pegs's conviction should be reversed.

F. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ENTER A SENTENCE PURSUANT TO THE FAMILY AND OFFENDER SENTENCING ALTERNATIVE

There are no cases published discussing FOSA yet. But the cases about DOSA sentences are instructive. In regard to those cases the

appellate courts have held that, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002, 966 P.2d 902 (1998).

Here, the trial judge refused to consider a FOSA sentence for untenable reasons. Her primary reason was that only 17 people had been granted such a sentence in Washington. First, the mere fact there are only a few FOSA sentences granted is not a legal reason to deny Pegs the alternative when he so clearly qualifies. Worse yet, the trial judge is wrong. The Department of Corrections reported in December 2011 that 57 offenders were provided this sentencing option and, to date 10 have successfully completed their sentence. Supp. C.P. ____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12. In the related program, the Community Parenting Alternative, (where the DOC is permitted to transfer an offender to ECM for the last 12 months of his sentence), there are 83 additional participants. *Id.*

Despite finding that Pegs qualified, the judge read additional requirements into the statute including the requirement that Pegs's case be

"extraordinary", Pegs be the only parent available to the child, and the notion that, in a co-defendant case, the sentencing alternative must be available to both defendants. The December 2011 DOC report simply does not bear this the notion out that the defendant's circumstances must be "extraordinary." Supp. C.P. ____, Sub. No. 105, Motion for Release Pending Appeal filed 6/7/12. It highlights that there are 163 children impacted state-wide. They range in age from birth to eighteen years old. It appears that one-third are 11-18 years old. *Id.*

Nowhere did the Legislature state that the sentencing alternative be reserved to "extraordinary" cases. It is available to any offender who meets the criteria and is for the benefit of "the children of the offenders" who are the "focal point of the program." The State failed to present any evidence that the children involved here would be better served by sending their father who loves them, cares for them and supports them – in particular by providing them with needed medical benefits – to prison.

Moreover, in related sentencing alternatives – like drug court and DOSA – co-defendants are frequently treated differently. Counsel can find no published case where the Courts have upheld the denial of a DOSA sentence simply because one participant in the crime was addicted to drugs and in need of treatment and the other defendant was not.

V.
CONCLUSION

For the reasons stated above, this Court should reverse Pegs's conviction and remand for further proceedings. This Court should also find that the trial judge erred in failing to grant Pegs a FOSA sentence.

DATED this 27th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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