NO. 44382-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEVON MARTEEN DANIELS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

No. 12-1-02173-4

BRIEF OF RESPONDENT

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2. Did the trial court abuse its discretion in admitting defendant's booking photo when identity was an issue?

3. Was there sufficient evidence to support the charge of burglary in the second degree beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

The defendant was arraigned on June 12, 2012 for the crimes of burglary in the second degree and theft in the first degree. CP 1-4. (Information and Dec. of Probable Cause) The charges stem from the burglary and theft from the business Forge Jack Pot located in Pierce County, Washington.

An omnibus hearing was held on August 15, 2012 and an order entered reflecting the parties' agreement as to the status of the case. The defendant declared his defense of "general denial" at that time. CP 230-32 (Omnibus Order).

The case was called for jury trial on December 10, 2012 by the Honorable Beverly Grant. A jury was selected and sworn that day. Opening statements and testimony took place the following day. Testimony concluded December 13, 2012.

The State called twelve witnesses, seven of which were law enforcement. CP 235 (Witness Record). Sixty-nine exhibits were admitted, to include a CD of the video surveillance of the crime. CP 236-39 (Exhibit Record). The defendant presented no witnesses and did not testify.

Closing arguments occurred in the afternoon of December 13, 2012 and verdicts of guilty returned as to both counts later that day. CP 233-34 (Verdict Forms).

The defendant was sentenced on December 19, 2012 to the high end of both counts. CP 261-74. (Judgment & Sentence). The defendant filed a notice of appeal the same day. This appeal timely follows.

2. Facts

At approximately 8:00 a.m. on June 11, 2012 the defendant entered the Forge Jack Pot gas and convenience store. 12/12/12/ RP 132-33, *see* Ex. 1. (Surveillance Video). The defendant spoke briefly to the store clerk, Ms. Espinosa. Defendant helped himself to a cup of coffee using

one of the store's paper cups. *Id.* He left briefly before returning a second time. This time he asked Ms. Espinosa if he could use the bathroom. 12/12/12 RP 135-36. They do not generally allow customers to use the bathroom, but she gave him permission this time. 12/12/12 RP 136. The small bathroom is connected to a small office. They are separated by a door with a less-than-ideal lock. One must pass through the bathroom to get to the office door. The office door has a sign saying, "No Exit." 12/12/12 RP 137-38, *see* Ex. 57 (photo). It is undisputed the defendant did not have permission to enter the office. Throughout her testimony, Ms. Espinosa continually referred to the defendant as the man who entered the store that morning, thereby identifying him. 12/12/12 RP 131-144.

The business owner, Mark Freisen, was away buying supplies when the defendant first entered the store. 12/12/12 RP 71. Freisen returned and entered the business with supplies as the defendant was entering the store for the second time. 12/12/12/ RP 48. Freisen saw the defendant enter the bathroom with one of their disposable paper cups. 12/12/12 RP 71. Some time passed and Freisen became concerned by the amount of time the defendant was in the bathroom. He was particularly concerned because earlier that morning he had counted out three days of receipts totally over $7,000. The money was in a zippered bank money

bag. The bag was in a locked drawer of a desk in the office. 12/12/12 RP 41-42. The office is adjacent to the bathroom. *See* Ex. 57 (drawing).

The defendant exited the bathroom; he did not have the coffee cup with him. 12/12/12 RP 71. Freisen immediately checked his office and found the desk drawer ajar, the bank bag missing, and a coffee cup sitting on his desk. 12/12/12 RP 73-74. He ran back to the main part of the store and yelled to a regular customer, Mike Jenkins, to stop the defendant. 12/12/12 RP 145, 148, 150. The defendant responded by running out of the store, into the parking lot, and into the neighborhood. Freisen and Jenkins gave chase. 12/12/12 RP 78-79, 150-51. Freisen and Jenkins testified about their initial unsuccessful attempt to catch the defendant. 12/12/12 79-80, 150-51. They lost the defendant, but a short time later they were joined by another friend, Erik Olson. Olson was in his pick up and helped look for the defendant. 12/12/12 RP 158-63. Meanwhile, Freisen returned to the store to speak with the responding officers. 12/12/12 RP 81. Freisen returned to the neighborhood with Jenkins and Olson and ultimately spotted the defendant. 12/12/12 RP 82-84, 152-54. They were able to stop and hold the defendant until police could respond. 12/12/12 RP 82-84. Freisen positively identified the defendant in court as the man who entered his business, specifically the bathroom, and fled upon hearing Freisen's discovery of the theft. 12/11/12 RP 48. His friend,

Mr. Jenkins also positively identified the defendant in court. 12/12/12 RP 149.

Tacoma Police responded to the area and searched for the defendant simultaneous with the victim and his friends.

After the defendant was apprehended, officers realized that the defendant had removed his jacket. Officer Otis elected to walk the likely route defendant took when he fled in an attempt to find the jacket and possibly the money bag. 12/12/12 RP 193-197. He came across some scattered money in the backyard of a house that abutted an alley. 12/12/12 RP 197. *See* Exs. 43-46 (photos). Officer Otis continued his search and located a gate into a yard that was standing open. 12/12/12 RP 201. He went through the gate looking for the next obvious path. 12/12/12 RP 204. He was contacted by a neighbor working in his yard, Troy Armatis. *Id.*

Armatis testified earlier that day he saw a young man running suspiciously through the neighborhood and in the backyards of several homes. Armatis pointed out the areas where he saw the man. 12/12/12 RP 184-86.

Officer Otis explained to the jury the various addresses he walked based on the information provided by Armatis. 12/12/12 RP 205-07. With the help of a K-9 unit, he came upon a jacket at the base of steps of a

home. 12/12/12 RP 207. A forensics technician responded and recovered the jacket. It was consistent with what the defendant had been wearing. *See* Ex. 1. Otis explained how the K-9 officer and his dog responded and assisted with the search. 12/12/12 RP 212-17.

K-9 Officer Martin testified that he and his partner, "Oscar," responded to assist in the search. 12/12/12 RP 224. The dog was deployed in the area identified by Otis. "Oscar" located the jacket at the base of the stairs of a home. *Id.* Oscar and the officers continued searching and ultimately came upon scattered money. The dog continued searching and found an unzipped bank deposit bag hidden under a tarp and gas can on the side of a house in an area consistent with the location described by Armatis. 12/12/12 RP 224-26. The victim positively identified the recovered bank bag as his missing bag. 12/12/12 RP 72-73.

Forensics technician Salvidar-Roller testified regarding the photos she took when she responded to both the victim business and the location where the jacket and money were found. She also testified she recovered a cell phone charger. The charger was laying on several dollar bills scattered along a nearby sidewalk. 12/13/12 RP 248.

Officer Ventura was the last witness to testify. He responded to assist with the investigation and the arrest of defendant. 12/13/12 RP 264. Ventura testified that he received the cell phone taken from the defendant

at the time of his arrest. Ventura learned that Salvidar-Roller had located a cell phone charger in the neighborhood. At trial he was given both the defendant's cell phone and the recovered charger. They fit. 12/13/12 RP 265-66.

The State played the store video surveillance CD. It showed the activity outlined by the testimony, including the defendant in the office and at the desk that contained the money. The cup recovered on the desk appears identical to the one the defendant had in his hand when he entered the bathroom, but did not have when he exited.

Officer Rush testified she transported and booked the defendant at the Pierce County Jail. 12/12/12 RP 174. She testified that she recovered the defendant's clothing after the defendant was booked. 12/12/12 PR 175. The clothing was booked into evidence and admitted at trial. 12/12/12 RP 181, *see* Ex. 67A (sweat pants).

Corrections Officer Pihl testified regarding her role as records custodian for the jail. She testified that two booking photos of defendant, exhibits 59A and 59B, were the photos taken of the defendant on June 11, 2012, the date of arrest for this offense. 12/13/12 RP 224-25. The photos were offered by the State to show how the defendant looked at the time of the offense. The defendant had substantially changed his hair before trial, therefore his appearance was different than at the time of the crime.

Defendant also argues the removal of Juror 18 for cause was improper. Juror 18 was removed following the State's motion to excuse Juror 18 for cause. The juror was questioned extensively on the topics of the truthfulness of police officers and the State's burden of proof. Juror 18's answers were clear. She stated she "*can't believe anything that comes out of their mouth.*" JVD 79. She repeatedly referenced "*things [she] had seen*" in the course of her life that made her untrusting of law enforcement. Juror 18 said that the State would need to prove the case "100 %." *See Respondent's Brf., section C.1(b)* for specific citations to Juror 18's statements. Juror 18 was excused after the court engaged in questioning of Juror 18.

The jury returned verdicts of guilty as charged to both burglary in the second degree and theft in the first degree.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING JUROR 18 FOR CAUSE AFTER SHE UNEQUOVIALLY STATED THE STATE WOULD HAVE TO PROVE THE CASE TO HER "100%."

a. Applicable Law

A trial court's decision to excuse a juror is reviewed for abuse of discretion. ***State v. Hughes***, 106 Wn.2d 176, 204 P.2d 902 (1986).

> An appellate court reviews a trial court's decision on actual bias in the same way as it reviews any other factual determination by a trial court. Rather than making its own de novo decision, the appellate court must defer to the trial court's decision.

Ottis v. Stevenson-Carson School District, 61 Wn. App. 747, 755, 812 P.2d 133 (1991). The Court continued:

> This is done by taking the evidence in the light most favorable to the prevailing party below, which in turn means that the appellate court must accept the trial judge's decision regarding the credibility of the prospective juror and any other persons involved, as well as the trial judge's choice of reasonable inferences.

Ottis, 61 Wn. App. at 755-56. (*Footnotes omitted*).

The law is clear, in cases where appellant challenges the trial court's ruling to remove a juror for cause, the trial judge's decision shall be given significant deference. The statute that best speaks to a trial court's obligation in this area is RCW 2.36.110, which states:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service. [Emphasis added.] (Appendix A).

In deciding whether to grant or deny a juror challenged for cause based on bias, the trial judge has fact-finding discretion, which allows the judge to weigh the credibility of the prospective juror based on his or her

observations. ***State v. Rupe,*** 108 Wn.2d 734, 749, 743 P.2d 210 (1987); ***State v. Jorden***, 103 Wn. App. 221, 11 P.3d 866 (2000), *review denied,* 143 Wn.2d 1015, 22 P.3d 803(2001). *Citing* ***State v. Noltie***, 116 Wn.2d 831, 809 P.2d 190 (1991), the ***Ottis*** Court said:

> ... [T]he trial court is in the best position to determine a juror's ability to be fair and impartial. It is the trial court that can observe the demeanor of the juror and evaluate and interpret the responses. [Footnote omitted.]

Ottis v Stevenson-Carson School District, 61 Wn. App at 756.

The State, as well as the accused, has the right to an impartial jury. *See* ***Hayes v. Missouri***, 120 U.S. 68, 70-71, S. Ct. 350, 30 L. Ed. 578 (1887). The jury process is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. ***State v. Hughes***, 106 Wn.2d 176, 185, 721 P.2d 902 (1986). The guarantee of impartiality cannot mean that the State has a right to present its case to the jury most likely to convict, nor can it mean that the defendant has a right to present his case to a jury most likely to acquit. ***State v. Hughes*** 106 Wn.2d at 185-86.

b. Applicable Facts

We next turn to the facts of this case and Juror 18. Defendant is rather selective in the portions of applicable transcript he includes. He states in his brief that Juror 18 "*voiced some concern...as to the honesty of*

police officers." *App. Brf.* p. 8. *Citing* 'JVD 97.' Though Juror 18 does not appear on that particular page of the transcript, she does on page 79. However, it is a bit of an understatement to describe her comments as merely "voice[ing] some concern...as to the honesty of police officers" *App. Brf.* p. 8. Here is what the juror said as it relates to her view of police officers:

> JUROR NO. 18: In Detroit. I've seen a lot and a lot I witnessed that was not very positive of police, and a lot of things *I seen police do it wasn't right.* A lot of things I have witnessed in Seattle that wasn't right and in Pierce County that wasn't right. *I grew up in Detroit, witnessed and living here[.] I've seen things that wasn't right.*

JVD 78. [Emphasis added.]

The State asked Juror 18 if that would impact her ability to listen to law enforcement officers or witnesses and be fair and partial?

> JUROR NO. 18: Yes, it would because, being honest, *I can't believe anything that comes out their mouth, and that is because of what I witnessed growing up, what I seen growing up.* People say things but regardless of what you say to bring it right back to, you know, do you want prejudice? I've grown up and I seen. Things I heard growing up, things I witnessed. *Things I seen with the police officers I had to deal with my own sons here in this state. I don't believe anything coming out of their mouth.*

JVD 79. [Emphasis added.]

In response to the State's question whether she could be impartial to a witness other than an officer, the juror responded:

> JUROR NO. 18: I can believe one side of the story but *when I hear another side of the story and it's all police saying something that a person did, especially a person of color, I don't believe them unless* -- I got to really, really, really believe the evidence. And I'm not putting anybody down but everybody might sugarcoat what they are thinking but I'm being real. *I seen too much and I have witnessed too much, as far as cops of me being a person of color*, and I'm not going to lie about it.

JVD 79-80. [Emphasis added.]

She also told counsel she had two members of her family that were in law enforcement. JVD 83. The State moved to excuse Juror 18 for cause. JVD 97. The court was inclined to agree with the State, stating, "*I think she* [Juror 18] *was pretty adamant.*" However the judge requested additional voir dire of Juror 18. JVD 98. Juror 18 came before the court for additional questions. The juror responded affirmatively when the State asked her if she could follow the law the judge gave and that she could listen to the testimony of law enforcement. JVD 103. The State then returned to Juror 18's prior comments regarding her opinion of law enforcement. The following questions and answers occurred:

> JUROR NO. 18: I won't necessarily not believe them because they are law enforcement officers but, like I said earlier, *they have to really prove their case, their point, in order for me to believe them because I have seen firsthand things that weren't right*. And I am not just saying that, I'm being real here. I seen things that weren't right. *I have three sons that was done to, my sons, and my face that I saw.*

> STATE: If you heard testimony from a law enforcement officer and then you heard other evidence that support what they had said...was consistent with what they had to say, could you ... actually believe that's what happened?
>
> JUROR NO. 18: Let me put it to you this way. *Listen to what I'm saying. I'm saying this: You have to really prove it to me because I have seen them do things and say it was true and it was not true,* because I was there and I witnessed with my own eyes. And what I said didn't mean anything, because what was told to me is *they are the law and they believe them before they believe you.* I have seen firsthand officers do things but because I'm nobody, and nobody will believe me, it was set in stone on paper. *And then my sons had to suffer for something that was not true* when me, I, saw and other people saw the same thing. This is what I'm saying.

JVD 104-05. [Emphasis added.] The court then asked Juror 18 several questions regarding the degree of proof she would require of the State:

> THE COURT: Do you think you could be fair and impartial based upon the evidence that has been presented to you and not based upon the experiences?
>
> JUROR NO. 18: Yes, I could. *I could be fair and impartial because if they have to prove something against someone they have to 100 percent in their proof in order to have these allegations against someone.* It is not from personal experiences or anything. I have to really, really, actually -- they have to really win me over with the proof.
>
> THE COURT: So if the proof is say 51 percent because they are only a small component of the overall evidence; hypothetically, I don't know, would that suffice or would you have an expectation that they have a higher standard up to a 100 percent.
>
> JUROR NO. 18: A higher standard as far as them being officers?

THE COURT: Of proof.

JUROR NO. 18: *They have to have a higher standard of proof,* because if they are going to those allegations against someone they have to have it. I'm just being real. *It has to be 100 percent proof in order for me to listen to it to give a fair opinion*, fair answer. Because I have someone's life in my hand and I don't know about everybody else but coming to this state I seen so many things and people still are hush, hush about it but it's reality. I seen so much. Like I said, I have three -- four children, three sons. *One son is dead now from things I have seen.* And I can't do anything about it because I am not higher up. And *I have seen people with 100 percent proof of things but it wasn't true*, and then a person suffered.

JVD 105-06. [Emphasis added.] She reiterated her requirement of "100% proof" again. JVD 106.

Lastly, the State asked if she were the prosecutor, would she want someone with her frame of mind on the jury. Juror 18 responded:

JUROR NO. 18*: I probably wouldn't.* It's not a frame of mind. I'm open and honest. I have been a very honest, open person all my life. I see things -- if it's black, I see black. If it's white, I see white. I see it for what it is, and *no prosecutor probably won't want me on their case because I see things fairly.*

JVD 107. [Emphasis added.]

c. Court's Ruling

THE COURT: All right. I think the State has established for cause with Juror No. 18. It's all or nothing with her, and it doesn't appear that she can be open enough to accept anything except all or nothing. So your motion to excuse for her for cause, Juror No. 18, is granted.

d. Analysis

Juror 18 was questioned extensively. She was asked multiple questions on the topics of police witnesses and the State's burden of proof. In addition to the responses already noted, she also detailed several contacts with law enforcement where she was the victim of violent crimes. She stated she was knocked down, an AK-47 put to her head, and robbed when sleeping with her child during Christmas. JVD 41. She told of another home invasion robbery where the perpetrators broke down her door. Her son called 911 and Tacoma Police responded.[1] She told of an incident that occurred in Detroit. She said she was attacked when walking home from work very late at night with a friend and her baby. JVD 43. When asked if any juror had been involved or witnessed money taken from their work place, Juror 18 responded. She told of being a restaurant manager when a man came through a window, put a knife down next to her hand, and took the till. JVD 52. These incidents are presumably some of the "things [she] has seen" in her contact with law enforcement.

There are more than adequate facts in the record to support the trial court's decision to excuse Juror 18 for cause. Juror 18 demonstrated not only actual bias but also her intent to apply a standard of proof other than what the law provides.

Juror 18 repeatedly referred to events she has seen, been a part of, or a family member has been a part of that caused her to be distrusting of law enforcement. JVD 78-80, 104-06. Probably most alarming is her statement regarding one of her sons. She said, "One son is dead now from things I have seen. And I can't do anything about it because I am not higher up. And I have seen people with 100% proof of things but it wasn't true, and then a person suffered." JVD 106. No attempt at rehabilitation could possibly counter Juror 18's belief that her son wrongfully died "from the things I have seen." *Id.* She used the phrase "things I have seen" repeatedly when being questioned as to her attitude toward law enforcement. JVD 78-80, 104-06. Furthermore, she states that even "100% proof...wasn't true." JVD 106. Juror 18 displayed a clear inability to divorce her extremely strong-held opinions from applying the proper applicable law.

Defendant cannot meet his burden that the trial court abused its discretion in excusing Juror 18 for cause. The trial court's decision should be reversed only if it was manifestly unreasonable, or based on untenable grounds, or made for untenable reasons. ***State v. Blackwell***, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *citing* ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A new trial is necessitated only when

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[1] A number of Tacoma Police officers were scheduled to, and did, testify in this case.

the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." ***State v. Bourgeois***, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (*citing* ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *see also* ***State v. Lemieux***, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) ("*Something more than a possibility of prejudice must be shown to warrant a new trial.*")).

There is ample evidence in the record to support the trial court's decision. That, coupled with the court's ability to observe Juror 18, and even question her, clearly allowed the judge to determine Juror 18's demeanor and her credibility. Juror 18 was not excused for manifestly unreasonable, untenable grounds or reasons.

e. Improper *Batson* Argument

It is a bit unclear precisely what the defendant is claiming in this section. The State presumes defendant is arguing that the removal of Juror 18 violated ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Batson applies to *peremptory* challenges and is designed to require counsel to state their reasons when there is a questionable request to exercise a peremptory challenge. ***Batson*** prevents a party from exercising a peremptory challenge based on race, in violation of a defendant's right to equal protection. ***Batson,*** 476 U.S. at 89, 106 S. Ct. 1712. "In order to contest a peremptory challenge, the defendant must first make out a prima

facie case of racial motivation. The burden then shifts to the State to articulate a race-neutral explanation for the exercise of the peremptory challenge." ***State v. Luvene***, 127 Wn.2d 690, 699, 903 P.2d 960 (1995).

However, at trial there was no objection or even argument that there was a violation of ***Batson***; ***Batson*** was never mentioned. Defendant does not point to any part of the record where the race of any person, juror or defendant, is mentioned during the argument regarding excusing Juror 18 or any other motion before the court. Any objection based upon ***Batson*** has not been properly preserved.

Argument regarding Juror 18 occurred twice. JVD 97-98 and 107-09. There is no objection, other than defendant's argument regarding the sufficiency of grounds to remove Juror 18 for cause. The State's argument regarding the basis for removal of the juror cannot remotely be argued as being race-based. Even if ***Batson*** applied to this situation, there is no basis for a **Batson** argument.

This claim fails.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DEFENDANT'S BOOKING PHOTO WHEN IDENTITY WAS AN ISSUE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990) (***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651, *review*

denied, 120 Wn.2d 1022 (1992)). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Rehak***, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." (Appendix B). Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. (Appendix C).

The primary, if not sole, issue in this trial was identity. Defendant endorsed "general denial" as his defense. CP 230-32. Defendant specifically inquired about mistaken identity in voir dire. JVD 62-63. Exhibits 59A and 59B were introduced for the purposes of establishing identity. *See* Exs. 59A & 59B (Booking Photos). The exhibits are the two booking photos taken on the day of defendant's arrest, which was shortly after the commission of the crime. The testimony elicited by the State clearly reflects that the photos were from that date, not a prior date. 12/13/12 RP 224-25. This obviously is significant because a photo taken

the day of the crime in question cannot confer the existence of any *past* criminal conduct.

The State submits that the only issue at trial was whether the defendant was the one who entered the office and took the money. Apparently defendant agrees. *See App.'s Brf.* p. 11:

> Although the identity of the person responsible for committing the crime was at issue, the fact that [defendant] was arrested for that crime was not....

Defendant misunderstands the purpose for which the State sought admission. The State was not trying to establish that the defendant was the person arrested that day, that is not in dispute. Rather the State was trying to establish what the defendant looked like on the day of the crime. Given he had materially changed his hair between his arrest and trial, he had to some degree changed his appearance. The jury was entitled to see what the eyewitnesses saw on the day of the crime to be able to best assess whether the defendant was the person the victim and witnesses saw. This obviously goes to their credibility of their in-court identification of the defendant. The jury knew the defendant was arrested and booked in the jail that day. 12/12/12 RP 166, 169, 175; 12/13/12 RP 224-25. The situation is on point with controlling case law regarding the admissibility of booking photos or "mug shots."

State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996) resolves this issue. That Court said:

> Because Defendant [] raised the issue of identity during opening statements, the photograph of the Defendant on the day of the crime was relevant as it tended to show that the victim's description to police matched the man arrested shortly after the robbery. The admission of the photo was not prejudicial because the jury knew the Defendant was arrested for the crime on which he was being tried, and the jury would reasonably have been aware that a booking procedure, including photographing the Defendant would have existed.

State v. Rivers 129 Wn.2d at 712. In this case, it is undisputed that the identity of the person who stole the money from the office of the victim business was an issue. The State alleged the defendant was the person who entered the business, asked to use the bathroom, and then entered the office adjoining the bathroom without permission, and stole the cash from the desk drawer. The person who did this was observed by a number of different individuals, each testified. The defendant elected to change his appearance by the time of trial. Since relevant evidence of the defendant's appearance at the time of the crime existed, the State was entitled to seek its admission.

The jury heard testimony from several of the responding officers that the defendant was taken into custody that day. 12/12/12 RP 166, 169, 175. They also heard that he was booked into the Pierce County Jail. 12/12/12 RP 169, 175. And lastly, as to the two exhibits, they heard from the custodian of jail records that exhibits 59A and 59B were the photos of

the defendant taken that day. 12/13/12 RP 224-25. The jury could not have presumed from the admission of the two exhibits that the defendant had any pre-existing criminal conduct.

The case cited by defendant, ***State v. Henderson***, 100 Wn. App. 794, 998 P.2d 907 (2000), supports admission of the defendant's booking photo in this case, not reversible error for admitting one as implied by defendant.

In ***Henderson***, the case was reversed for cumulative error, not for the admission of a booking photo. One basis cited for error in ***Henderson*** was the State elicited from the interviewing detective that the defendant in that case declined to submit to a taped statement. This was improper because the parties knew that the defendant declined to give a taped statement when requesting an attorney. The court determined it was not necessarily a comment on the defendant's right to remain silent, but it was however, improper. Furthermore, ***Henderson*** is not about the initial admission of the photo, but rather the State's use of it in argument. The errors regarding the photo were particularly egregious

The "mug shot" in ***Henderson*** was of a booking prior to, and unrelated to, the case for which he was being tried. In closing the State specifically stated that the admitted "mug shot" was one "[T]he sheriff's department...had on hand before [his arrest]." The State clearly used the

photo as a vehicle to tell the jury the defendant had been arrested before. This differs greatly from the current case.

In the present case, the State established through three witnesses that the defendant was arrested the day of the crime. (Joseph: 12/12/12 RP 166-69; Rush: 12/13/12 RP 175-78; Pihl: 12/13/12 RP 224-25). Exhibits 59A and 59B were specifically admitted through the jail records custodian who specified the two photos were from the defendant's booking on the present case. 12/13/12 RP 224-25. There is nothing to suggest that the State ever improperly used or argued anything other than the photos depicted the defendant's appearance at the relevant time, i.e. the day of the crime. These facts are in stark contrast to the facts of ***Henderson***.

Defendant also cites ***State v. Sanford***, 128 Wn. App. 280, 115 P.3d 368 (2005) in support of his argument. Identity was not an issue in ***Sanford***. In that case, the defendant acknowledged a fight with the victim, but claimed he did not assault her. The appellate court ruled that the State did not need to admit the photo from a prior booking that the arresting officers used to properly identify Sanford after he have a false name. It was unnecessary because Sanford acknowledged at trial that he lied and gave a false name to the officers. That could have been

adequately established through witnesses; the booking photo was not necessary for that purpose.

The court discounted the reasons the State cited for seeking its admission. The court concluded that identity and the false name were not issues at trial, and for that reason the photo was not relevant to a material outstanding issue. The evidence in ***Sanford*** was not overwhelming as a whole, therefore the admission of the booking photo from an unrelated arrest was prejudicial. Like ***Henderson***, ***Sanford*** is also distinguishable from the present case.

Here, Daniel agrees identity was disputed. The defendant did not meaningfully dispute that the crime occurred, the facts surrounding where the money had been stored, the amount, or that it was recovered. The only issue contested was that of the identity of the perpetrator. The issue of identity was clearly material to the outcome of the case. The State also submits that there is significant evidence of Daniel's guilt in the present case. Other cases have addressed this issue. For this argument, the State respectfully asks this court to see the section of this brief regarding the sufficiency of the evidence. (Section C3).

State v. Scott, 93 Wn.2d 7, 604 P.2d 943 (1980), *cert. denied*, 446 U.S. 920, 100 S. Ct. 1857, 64 L. Ed. 2d 275 (1980). A redacted booking photo was properly admitted when the identifying information had been

redacted and the defendant in that case had materially changed his appearance by a haircut between arrest and time of trial. The State notes however, that the ***Scott*** court concluded the photo did not suggest it was a police "photo." ***State v. Scott*** 93 Wn.2d at 13. In the present case, the State recognizes the photo was admitted as a booking photo and the jury so informed. ***Scott*** cites ***State v. Wheeler***, 22 Wn. App. 792, 593 P.2d 550 (1979) in support of its ruling. ***Wheeler*** is also very similar to the present case. The court said:

> The principal objection to the admission of a "mugshot" is that the identifying marks on this type of photograph indicate the accused has a prior criminal record. ....[H]owever, the testimony [in this case] and the date imprinted on the photograph clearly indicate that it was taken the night defendant was arrested for this crime...the State's use of the photograph to establish defendant's identity was quite appropriate after it became apparent that his facial appearance had changed considerably between the date of the incident and the time of trial.

State v. Wheeler, 22 Wn. App. at 796-97.

State v. Tate, 74 Wn.2d 261, 444 P.2d 150 (1968) also supports the admission of the booking photo. In ***Tate*** the Court rejected appellant's contention the admission of his booking photo was error. The Court said it was material and relevant for two reasons. First, it was the photo from which the prosecuting witness originally made her identification of Tate. Second, the Court said the record showed the defendant had changed his

appearance between the time of his arrest and the time of trial and the picture portrayed the defendant as he looked at the time of the alleged assault even though it was taken a year earlier. ***State v. Tate*** 74 Wn.2d at 267.

Based upon the facts of this case and the applicable case law, the admission of defendant's booking photo from his arrest in this case is proper.

Lastly, if this court finds the admission improper, this court should not find it so prejudicial to warrant reversal. The trial court's decision should be reversed only if it was manifestly unreasonable, or based on untenable grounds, or made for untenable reasons. ***State v. Blackwell***, 120 Wn.2d 822, 845 P.2d 1017 (1993).

A new trial is necessitated only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." ***State v. Bourgeois***, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (*citing* ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); *see also* ***State v. Lemieux***, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) ("*Something more than a possibility of prejudice must be shown to warrant a new trial.*")). Given the significant other evidence of defendant's guilt, there is ample evidence to support this conviction, and the photos not so unduly prejudicial that they affected the outcome of the

trial. Specifically, the defendant was identified by several witnesses as the person who entered the victim business's bathroom. This is corroborated by the video tape. *See* Ex. 1 (Video tape). Witnesses also corroborate that defendant ran from the building and that the stolen money bag was found along the route defendant ran when he fled. 12/12/12 RP 225-26. Please also see the next section of this brief regarding the sufficiency of the evidence for additional delineation of the evidence.

3. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION BEYOND A REASONABLE DOUBT.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, the court draws all reasonable inferences from the evidence in favor of the State and interprets them most strongly against the defendant. *Id.* In the sufficiency context, this court considers circumstantial evidence as probative as direct evidence. ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court may infer specific criminal intent from conduct that plainly indicates such intent as a matter of logical probability. *Id.* The court should defer to the fact finder on issues of conflicting testimony, witness

credibility, and persuasiveness of the evidence. ***State v. Raleigh***, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

The defendant was convicted of committing burglary in the second degree by unlawfully entering or remaining in a building with the intent to commit a crime against a person or property therein. The only element at issue on appeal is whether the State proved the defendant entered or remained unlawfully.[2] The jury was instructed that the definition of the term is when a defendant is not licensed, invited, or otherwise privileged to so enter or remain. (CP 240-260, Jury Instructions, JI 8 at 250).

Additionally, jury instruction number eight included the following language:

> A license or privilege to enter or remain in a building that is only partly open to the public is not a license or privilege to enter or remain in that part of the building that is not open to the public.

Id.

This is an accurate statement of the law. ***State v. Thompson***, 71 Wn. App. 634, 638, 861 P.2d 492 (1993), ***State v. Crist***, 80 Wn. App. 511, 514, 909 P.2d 1341 (1996). ***State v. Crist*** lays out various factors for consideration. For example, the Court stated the first step is to determine

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[2] Defendant concedes in his briefing that he was the one that entered the business. *App.'s Brf.* p. 14.

if defendant's entry was privileged. ***Crist*** 80 Wn. App. at 515. In this case, defendant asked permission to use an area of the business not open to the public. He received permission to enter only the bathroom. 12/12/12/RP 136-38.

Next, was the privilege limited or impliedly limited. *Id.* There is no evidence in the record to reflect that defendant was in any way given permission to enter any room other than the bathroom. The victim testified that he has a sign on the office door indicating that it is not an exit. *See* Ex. 19. Furthermore, it was also undisputed that one must enter and pass through the bathroom to get to the office. 12/12/12 RP 138. In other words, one cannot mistake the office door as the door to the bathroom. Additionally, the victim and clerk testified the door was locked. 12/12/12 RP 103, 106, 109, 138. The privilege to enter was clearly limited. *Id.*

Lastly, did the defendant violate the limits of the invitation and did he do so with the intent to commit a crime. When the evidence is viewed in the light most favorable to the State, it is clear that the State proved the necessary element.

By virtue of their verdict, the jury determined the identity of the person that entered the office and took the money was the defendant. CP 233-34. Both the victim and the clerk observed the defendant exit the

bathroom. 12/12/12/ RP 139. They identified the defendant as the man that entered and exited the bathroom, left the building, and ran when told to stop. 12/11/12 RP 48, 52, 68, 78; 12/12/12/ RP 139-41. Perhaps even more persuasive is Ex. 1, CD of video surveillance. *See* Ex. 1. The various "tracks" or sections depict different areas of the store. Section 6 of the video is the defendant entering the office, reaching over in the area of the desk, and creating a noise that closely resembles the sound of the zipper on the money bag. The defendant's coat was not zipped up at any time, and he was wearing sweat pants, therefore no zipper. *See* 67A (sweat pants). The nature of the noise and the location and time in which it is heard, clearly supports the State's argument that the defendant took the money. The video also shows defendant has the coffee cup described by witnesses that coincides with the one recovered on the desk. *See* Exs. 1 (video tape), 27 (photo of desk). This evidence, in conjunction with the testimony of the witnesses, clearly supports the element that the defendant entered and remained unlawfully in the office and committed a crime therein.

As for the testimony, the victim testified the defendant was carrying one of the business's coffee cups when he entered the bathroom. 12/11/12 RP 71; 12/12/12/ RP 134. The defendant did not come out of the bathroom with that cup. The victim ultimately found the cup in the middle

of his desk in the office. 12/12/12 RP 71-72, 75, *see* Exhibits 21-23, 25-28. The clerk continually referred to the person in the store as the defendant. 12/11/12 RP 132-36. Customer Michael Jenkins testified. He identified the defendant as the one he saw in the store and who ran when the victim yelled out. 12/12/13/ RP 149-50. Mr. Olson testified he helped try to find the defendant. He gave a recount of their route that was corroborated by witness Troy Armatis. (Olson: 12/12/12 RP 158.) Armatis testified that he saw a man running behind his neighbor's fence; he saw him pop his head above the fence, then go back behind it and jump a fence. 12/12/12 RP 185-86. This route was also confirmed by Officer Otis and ultimately by the canine officer, Officer Martin. (Martin: 12/12/12 RP 201-07, 224-26; Otis: 12/12/12 RP 195-97, 201-07). Together these witnesses establish that the defendant was in the bathroom, had a coffee cup with him prior to entering the bathroom that was found in the office, and that he fled when chased by the victim and other customers. The defendant's behavior supports the charge that he committed the burglary in question in that he took property without permission.

Additionally, the missing money bag was recovered along the route the defendant took when he fled. 12/12/12 PR 87, 225-26. Cash money was also located along the route. 12/12/12 RP 197, 225. *See* Exs. 43 - 46 (photos). Also recovered was a lone phone charger. 12/13/12 RP

247, 266. Ventura testified *and demonstrated* that the phone charger fit the phone recovered from the defendant when he was arrested. 12/13/12 RP 266. These are just a few examples of evidence supporting the jury's conclusion the defendant took the money.

There is also no dispute that the defendant was not allowed in the office. 12/11/12 RP 117. It was a separate room from the bathroom. There is no evidence that the defendant had ever previously been allowed in the office or that he had any approved legitimate reason to be in the office. When all permitted reasons are eliminated, the only logical conclusion is that the defendant entered the office to see what he could find and take. This is further supported by the testimony of the victim when he said he had last placed the bank bag of cash in a locked lower drawer on the opposite side of the desk from where the door to the office was. 12/11/12 RP 45; 12/12/12 RP 103, 106, 109. *See* Exs. 19, 21-23, 25-28 (photos). In other words, the defendant had to search for the bag. The defendant did not have permission to enter or search the office of the victim business. 12/12/12 RP 117. The defendant immediately fled when he heard the victim yell for him to stop after discovering the money missing. 12/11/12 RP 48, 52; 12/12/12 RP 68, 78. This occurred just after the defendant walked out the front door of the business, almost immediately after taking the money. The defendant continued to run even

with the victim chasing him. 12/12/12 RP 78-84. The only reasonable interpretation from this conduct is that the defendant took the money without permission.

The evidence supports the conclusion beyond a reasonable doubt that the defendant entered, remained long enough to search at least the desk, and take the money bag. The State has proved the defendant entered and remained in the office with the intent to commit the crime of theft. There being no meaningful argument as to the remaining elements, the State proved the defendant committed the crime of burglary in the second degree beyond a reasonable doubt.

The State proved all elements of burglary in the second degree beyond a reasonable doubt.

D. CONCLUSION.

The trial court did not abuse its discretion when it excused Juror 18 for cause. Juror 18 repeatedly stated she could not fairly interpret or hear testimony of law enforcement witnesses. There were seven law enforcement witnesses scheduled to testify in the matter. Additionally, Juror 18 repeatedly referenced unpleasant events she had witnessed or been party to that also caused her not to "trust anything that came out of their mouths." Additionally, she said on several occasions that if officers

testified she would hold the State to a burden of proof of "100%." The juror was properly excluded.

The booking photo of the defendant taken the day he was arrested for the crimes that are the subject of this appeal was not improper because the defendant had changed his appearance before trial and identity was a material issue.

Review of the evidence in the light most favorable to the State clearly demonstrates that there was sufficient evidence to support all elements of the charge of burglary in the second degree.

The State respectfully requests this court affirm the defendant's convictions.

DATED: May 5, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KAWYNE A. LUND
Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/6/14
Date Signature

APPENDIX "A"

RCW 2.36.110

C

Effective:[See Text Amendments]

West's Revised Code of Washington Annotated Currentness
Title 2. Courts of Record (Refs & Annos)
Chapter 2.36. Juries (Refs & Annos)
2.36.110. Judge must excuse unfit person

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

CREDIT(S)

[1988 c 188 § 11; 1925 ex.s. c 191 § 3; RRS § 97-1.]

Current with 2014 Legislation effective before June 12, 2014, the General Effective Date for the 2014 Regular Session

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APPENDIX "B"

ER 401

C

West's Revised Code of Washington Annotated Currentness
Part I Rules of General Application
Washington Rules of Evidence (Er)
Title IV. Relevancy and Its Limits
RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Current with amendments received through 11/1/2013

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APPENDIX "C"

ER 403

C

West's Revised Code of Washington Annotated Currentness
Part I Rules of General Application
Washington Rules of Evidence (Er)
Title IV. Relevancy and Its Limits

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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PIERCE COUNTY PROSECUTOR

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Court of Appeals Case Number: 44382-1

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