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COA No. 361349 - III

SUPREME COURT
OF THE STATE OF WASHINGTON No. 98809-9

HARLAN DOUGLASS and MAXINE H. DOUGLASS,
Plaintiffs/Respondents

vs.

BRYAN J. REILLY
Defendant/Appellant/Petitioner

ANSWER TO CR 11 MOTION

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I. IDENTITY OF RESPONDING PARTY

The Responding Party is the Petitioner Bryan Reilly ("Reilly").

II. FACTS RELEVANT TO MOTION

The Moving Party, Respondent Harlan Douglass, alleges that Petitioner Reilly's Petitioner for Review contains 15 separate statements that Reilly's counsel Chad Freebourn knows to be false. All of Respondent's allegations center around Reilly's argument that Respondent's counsel, Steve Hassing, violated the trial court's order in limine preventing any mention that Reilly was charged with six felonies directly related to the civil claims for conversion sought by Respondent. Respondent takes the position that there was no signed order in limine preventing his counsel Mr. Hassing from asking about the six felony charges, and that for Reilly to argue differently warrants a CR 11 sanction. Regardless of whether there was a signed order in limine, the trial court granted the motion in limine precluding Mr. Hassing from mentioning the six felony charges at trial.

Further, there is no legal basis or rule that would ever allow Mr. Hassing to inquire about the felony charges in this civil case. At the time of trial, Mr. Reilly had no criminal convictions. The

relevant facts and evidence showing there was no misrepresentation by Reilly and his counsel appear below in support of the argument.

III. DISCUSSION

"*The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system.*" Bryant v. Joseph Tree, Inc., 199 Wash.2d 210, 219, 829 P.2d 1099 (1992). CR 11 was designed to reduce delay tactics, procedural harassment, mounting legal costs, and to cause attorneys to investigate more carefully before filing papers. Id. However, CR 11 was "*not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.*" Id. To this end, the Washington Supreme Court quoted the following:

> **Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.**

Id., quoting, Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9th Cir. 1990)(emphasis added). Therefore, courts

must consider deterring baseless claims as well as the chilling effect CR 11 may have on advancing meritorious claims. Id. The reasonableness of an attorney's actions is evaluated by an objective standard under the circumstances. Id. at 220.

Respondent argues the Supreme Court has been misled by Reilly's argument that Mr. Hassing violated an order in limine and improperly inquired about Reilly's six felonies charges at trial. On the issue of whether the prior criminal charges were relevant and admissible at trial, the trial court stated:

> ***So at this point what I'm going to do is deny the motion – excuse me, grant the motion. I was reading it in the opposite way. So the defense is precluded from mentioning to the jury that Mr. Reilly has not been charged. Whether or not he's charged with a crime criminally is not relevant to the civil case, especially since it's not a conviction, which would go to credibility. But the same token, it seems that it would prejudice the defense if the Court were to allow evidence to come in that he has been charged on the previous matters, and it would lend credibility to these previous matters. But I think overall it would really confuse the jury.***

RP 85. At the time, Reilly did not have a written motion in limine before the trial court seeking to prevent Respondent from mentioning the six felony charges, but had raised the motion in limine orally during argument in response to the motion of the Respondent. **RP 85.** The trial court had already indicated that the

prior charges were prejudicial to Reilly, were not convictions, were not relevant, were objectionable, confusing and would mislead the jury. **RP 85-86.** At the time the motions in limine were argued, the trial court clearly indicated that any mention of the six felony charges was not permitted, by either party. **RP 85-86.**

After Mr. Hassing asked Reilly's mother at the start of trial whether she was aware her son had been charged with six felonies associated with a theft at Respondents' home, Mr. Freebourn objected pursuant to the order in limine. **RP. 238.** The trial court excused the jury, and after argument by Mr. Hassing that there was no written order precluding mention of the six felonies, the trial court stated:

> ***THE COURT: There was a corresponding order when this motion was brought up. It was over a week ago when we did the motion in limines. The defense didn't have an objection, as I recall, to the State's [sic] motion to preclude any information that Mr. Reilly's hasn't been criminally charged with the theft from the safe. At that time the defense brought the corresponding motion that the plaintiff be precluded from mentioning that Mr. Reilly has been charged to bolster the credibility of the items that were taken previously. So although it's not in the written order, as I recall, the Court granted that corresponding motion.***
>
> ***MR. HASSING: Was that a written motion or did they bring that up in argument somewhere along the line?***

THE COURT: *They brought it up in argument.*

MR. HASSING: *All right.*

THE COURT: *They had no objection to your motion provided you did the same and they didn't use the fact that he has been charged to bolster the previous alleged theft.*

RP. 240 (emphasis added).

"*The purpose of a motion in limine is to depose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.*" State v. Evans, 96 Wash.2d 119, 123, 634 P.2d 845 (1981)(emphasis added). By asking Reilly's mother, the first witness in the entire trial, about the six felony charges Mr. Hassing clearly intentionally violated the trial court's order in limine. **RP 240.** Regardless of whether Mr. Hassing thought there was an order in limine precluding inquiry as to the felony charges, there is no other legal basis making such an inquiry proper.

When Mr. Hassing asked Reilly's mother about the felony charges, Reilly had never been convicted of any crime. ER 404(b) makes any other crime, wrongs or acts inadmissible to prove character in conformity therewith. Such an inquiry is also prohibited by ER 609 as well, and only allows evidence of other

convictions under certain circumstances, which were not present in this civil trial. Further, prior instances of conduct are rarely if ever admitted in civil cases to show character. Karl B. Tegland, Washington Practice: Evidence Law and Practice § 405.5 (5th ed. 2007). A rare exception to the rule is in cases where, character is directly at issue. Houston v. New York Life Ins. Co., 166 Wash. 611, 620, 8 P.2d 434 (1932).

At oral argument before the Appellate Court, the following occurred between Judge Korsmo and Mr. Hassing:

> ***JUDGE KORSMO: ...Why the heck did you risk the mistrial by asking about the pending charges.***
>
> ***MR. HASSING: Well, that's a good question and my client asked me the same thing that day. First of all, I want to –***
>
> ***JUDGE KORSMO: I mean, you were darn lucky Judge Cooney just didn't bang it out, you know –***
>
> ***MR. HASSING: Except for one thing –***
>
> ***JUDGE KORSMO: -- kick you down the road.***
>
> ***MR. HASSING: Except for one thing, you honor. We had motions in limine. And in the motions in limine, I had made a couple of motions that certain things shouldn't be brought up like Harley***
>
> ***JUDGE KORSMO: But right, but you know, and I understand the technical argument about the Judge not actually ruling off of that –***

MR. HASSING: Right.

JUDGE KORSMO: --that's where Judge Cooney hung his hat, but why as a trial practitioner would you even risk it?

MR. HASSING: Well, in hindsight, might not have been my best most in that trial. But, you know, I've done over 100 trial and I've made mistakes in every one of them. And this one here, I didn't get caught on. And, I mean, by caught on, the Judge didn't call a mistrial, so the Judge has his own reasons for not calling a mistrial and that's because he knew there was no such order. I realize he still could have.

JUDGE KORSMO: But, right, even if there hadn't been a discussion in the motion in limine, though, this just being the first question to ask.

MR. HASSING: Well, I can't argue with you, your honor, you're right on that.

Appendix A, Appellate RP 13-14.

Mr. Hassing indicates that he has tried more than 100 jury trials, which would lead one to believe he should be familiar with the Rules of Evidence, which would never allow evidence of pending criminal charges in a civil case to be admitted at trial. Judge Korsmo raises the issue with Mr. Hassing because there is no legal basis for making such an inquiry in front of a jury. The surrounding facts, circumcises, law and evidence rules show that Mr. Hassing intentionally violated the order in limine, or at best,

forgot the trial court granted the motion in limine preventing any mention of the felony charges, and as an experienced legal practitioner, disregarded all the Rules of Evidence and case law holding character evidence is inadmissible in a civil trial.

The corresponding Appellate Decision, states:

> ***Although we agree with Mr. Reilly that Mr. Douglass's attorney improperly questioned Mr. Reilly's mother about the existence of criminal charges, the trial court did not abuse its discretion in denying the mistrial motion. Regardless of whether counsel's question violated an in limine order, the propriety of a new trial turned on the question of prejudice.***

Harlan Douglass, et ux v. Bryan J. Reilly, 36134-9-III WL 3432978 * 4. The Appellate Court clearly found Mr. Hassing's question improper, and to violate the trial court's order in limine. This motion for CR 11 sanctions alleging misrepresentations to the Supreme Court is without merit, and is being made for no other reason to increase Reilly's legal costs and engage vexatious litigation.

IV. CONCLUSION

Respondent's motion for CR 11 sanctions is without basis and should be dismissed, as Reilly and his counsel have not

misrepresented the status of the motion in limine in the Petition for Review.

DATED this 11th day of September, 2020.

ROBERTS | FREEBOURN, PLLC

s/ Chad Freebourn
CHAD FREEBOURN, WSBA #35624
Attorney for Petitioner Bryan Reilly

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of September, 2020, I caused to be served via the Court of Appeal filing system and via Email a true and correct copy of the foregoing document to the following:

Steven J. Hassing
425 Calabria Court
Roseville, CA 95747
sjh@hassinglaw.com

s/ Chad Freebourn
CHAD FREEBOURN

APPENDIX A

12:21:42 JUDGE PENNELL: A slight panel change. I'm the only new one. I'm Judge Rebecca Pennell. To my right is Judge Kevin Korsmo. To my left is Judge George Fearing. We will take up with the case of Harlan Douglass vs. Bryan Reilly. Counsel, it's only -- although there were cross cases, there's only appeal by Mr. Reilly, the appellant. When you come forward, please let us know how much time you would like for rebuttal. The clock ticks down from 15 minutes; so, if you say, take five minutes for rebuttal, you'll still see that it starts at 15 minutes. When you hit your rebuttal time, the light will start to glow yellow instead of green.

Please proceed.

MR. FREEBOURN: Thank you. Good morning. May it please the court, I'm Chad Freebourn here today on behalf of the defendant, Bryan Reilly. I'd like to reserve five minutes for rebuttal.

JUDGE PENNELL: Thank you.

MR. FREEBOURN: This case, as you are aware, is about conversion of money. And Mr. Reilly has appealed essentially five issues. Two of which are directly related, with regard to the fact, first being that Mr. Douglass did not prove the elements of conversion, despite the jury returning a verdict in his favor. The amount of money--

JUDGE KORSMO: By that, you mean he didn't prove that your client possessed the money.

MR. FREEBOURN: Yeah, he didn't, he didn't -- first of all, prove

that he actually had the money. And then he didn't prove that my client ever possessed the money.

JUDGE PENNELL: If he proved that your client stole the money, would that be good enough? Or are you saying that that's not good enough?

MR. FREEBOURN: I'm saying that in a conversion case, as we all learned from the start in law school, there's not really a dispute on who has the property. The example that we all know is that, if I leave my car at your house, and I go back to get my car and you say, "No, I'm going to keep your car." We have an argument over who has the right to the possession of the vehicle. There's no question that you have my vehicle, or you have a vehicle that we're having an argument about. And when I bring that case, I need to present such things as, the title to the car; I need to present registration to the car; evidence that I purchased the car. I can even show pictures of me with the car to show that I have -- that it's my car. In this particular case, none of that occurred.

JUDGE PENNELL: So, you're claiming there was no proof that Mr. Douglass owned the money.

MR. FREEBOURN: Correct.

JUDGE PENELL: Okay, so his statement that I left a million dollars in shoe boxes, and various witnesses statements that there was, you know, a quarter of a million dollars in one of the shoe boxes. They all looked about the same; they were in the

safe, they are no longer in the safe. Circumstantial evidence ties your client with the break-in to the safe. That's not enough to prove that Mr. Douglass once had four shoe boxes full of money?

MR. FREEBOURN: No. And the reason being is that, when you're looking at who the plaintiff is, the plaintiff is Harlan Douglass. Right?

JUDGE PENELL: Mm-hm [affirmative]

MR. FREEBOURN: Harlan Douglass doesn't know how much money was in the safe.

JUDGE PENNELL: Well, that's often the case. And you can estimate. I mean the fact that you don't know to the penny doesn't mean that there's not sufficient evidence to -- for an estimation. Here we have four shoe boxes. We have a tally of one, that's approximately a quarter of a million dollars. Do the math. There's basis for the jury to find approximately a million dollars was taken altogether. And then you have what was recovered, less than that. But I don't know that the law requires more exact evidence than that; it goes to weight not sufficiency, doesn't it?

MR. FREEBOURN: Well, in the Westview case, which is 133 Wn. App.835, it talks about money being the subject of conversion. And money is different than normal property. I mean, it's not the same as the car example, as I gave you when I first began. Because in order to have conversion of money, it has to be the

identical money. Otherwise, every single person who puts a deposit in a bank can allege that the bank converted their money. It has to be held. It has to be the -- it has to be in one amount, at one time, and it has to be identifiable. The amount of money that Mr. Douglass alleges that he has is in different denominations. It was -- when it was counted, they arrived at $264,000 pursuant to a tally sheet. They said that that was roughly half the money. So, I mean, even if you give him the benefit of the doubt, when it was found it was in 100s, 50s, 10s, 20s. And so, the first -- and the thing about it is, as the evidence was presented at trial, you have Lisa Douglass who is telling the police that it was 250 then 400 then 700 then a million.

JUDGE PENNELL: Don't we construe the evidence, though, in favor of the jury's verdict? You're right. The jury could have said no liability. But the fact that there was competing evidence is different from was there sufficient evidence. So, when we're looking at sufficient evidence, and we do this all the time in criminal cases in this place, seems kind of like a criminal case; though it wasn't. We look at the evidence in the light most favorable to the state in the criminal cases. Isn't that true here, too? We look at the evidence in the light most favorable to the jury verdict. And though Lisa Douglass may have said different things at different times, there was other testimony that could be used to infer that the total

approximated a million dollars.
MR. FREEBOURN: Well, when they ultimately found the money and counted the money and they arrived at--
JUDGE PENNELL: They didn't find all the money. The testimony was, in the plaintiff's, they didn't find all the money.
MR. FREEBOURN: But also, as a requirement to testify, you have to have personal knowledge in order to testify to a fact.
JUDGE PENNELL: Well, Lisa Douglass moved the boxes of money. She helped move the boxes from -- when they were-- from the safety deposit box and put into the safe. She helped move the boxes. Harley Douglass also helped moved the boxes. There's circumstantial evidence that would support that each one of the boxes contained roughly the same amount of money. And it wasn't the $360,000 that was found. There was more money than that.
MR. FREEBOURN: Two points with regard to that, there was no testimony or evidence that Lisa or Harley Douglass ever counted the money. So, that's first.
JUDGE PENNELL: I understand that. There was other evidence, though, that Ms. Via, I think it is, counted the money. And there was a tally on one of the boxes. And then, again, this is just inference.
MR. FREEBOURN: Mm-hm [affirmative]
JUDGE PENNELL: But, in the light most favorable to the state, one of the boxes contained a quarter of a million dollars. Several witnesses said there were four boxes. All the boxes seem

to be similar in size and weight. You talk about 20s. I read the transcript and didn't see a mention of 20s, I saw your client saying 50s and 100s. Mr. Douglass, I said -- I think said -- it was mostly 100s that were in those boxes. So there's at least some evidence to believe the boxes were all substantially similar, so it would -- it seems viewing the light most favor, it's not that the jury had no basis for saying -- that amount of money.

MR. FREEBOURN: Well, also it's the difference between reasonable inference and conjecture. When you're relying solely upon circumstantial evidence, it has to be tied in a way such that it can only prove one result. And when we move to -- when…you can't… it's not enough to say that an accident could have happened one way, without proving that it couldn't have another. And that is, that's based upon the fact of when you only have circumstantial evidence to prove your case. And when we move to the next element, to prove that Mr. Reilly actually ever possessed the money, there was no evidence presented whatsoever that he actually possessed the money.

JUDGE PENNELL: What evidence would they need, that he actually possessed the money? Are you saying that unless they have an admission, or someone that sees him with the money, they can't prove their case through circumstantial evidence?

MR. FREEBOURN: The essential element of conversion is to prove that somebody either possesses actually or constructively --

JUDGE PENNELL: I understand. But I'm talking about method of proof. You can prove something direct. Meaning, I saw him with the money, or he confessed himself, so he's a witness to seen with the money. But there's no requirement under the law that you have direct evidence. Thank goodness, or there would be many torts and many crimes that are unsolved. You can also prove through circumstantial evidence, wasn't there; so why is the circumstantial evidence not sufficient to show that he once had the money?

MR. FREEBOURN: There were seven, there were eight -- in their brief there were 8 examples of the circumstantial evidence, that they say prove that he possessed the money. The first was that he found the money. He never touched the money. And conversion requires interference with the money. There's no fingerprints or proof that he ever touched the money. That's not interference or possession. The next is that he didn't set a security alarm. There were nine other people there on that same day. It wouldn't matter whether or not he set a security alarm or not. The next one was that his cell phone was somewhere in the vicinity. That never shows that he has the money or that he was ever in their home. It says that there was a video, that we show that he was at Hill's Resort, they said that that was off by an hour. That doesn't show that he ever possessed the money. That he had access to the home. Well, so did nine other people. And nine other people were actually there on that day. The only person

they couldn't prove was in the home that day was him.
JUDGE PENNELL: They are all circumstantial evidence. And, for me, what's most telling, although you want to bifurcate, was he was the only one stealing money on a regular basis from the Douglasses. Stealing the diamond rings, stealing the gold coins. And the jury could rightly reject his explanation, that he never shared with anyone, that he found a $60,000 diamond ring that he found on the side of the road. The jury could rightly find that he had been pilfering from Mr. Douglass for years, and that on the day that Mr. Douglass finally put in an alarm system, that would have tracked his location, he tried to get off -- take all the money. Because that was his last chance. Couldn't the jury infer that? It seems like the prior acts are what makes a big difference between your client and those other individuals.
MR. FREEBOURN: Well, that was exactly why the case should have been bifurcated. Because we are talking about something that occurred in the years of 2013 and 2014.
JUDGE PENNELL: But prior acts can tend to show motive, common planner scheme. They can't show character. But that's exactly why you can have prior acts to show those things. This seems to be a classic case of prior acts of a common planner scheme, to steal, that ended with a big theft on the day that a security alarm was put it.
MR. FREBOURN: Mr. Reilly never denied that he had possession of any of that other property. He --

JUDGE PENNELL: Why doesn't that tend to prove that he also stole the million dollars?

MR. FREEBOURN: It doesn't tend to prove… and this was the part that the trial court got confused about with regard to the directed verdict. The trial court was saying, well he had $37,000 in his bank, you know, five months before and those sort of things. But this is not a criminal case, this is a conversion case. And a conversion case, requires that the person actually have possession of the money. No one ever proved that he had possession. And when -- and just like you're going down the road, if someone's allowed to hear, well, he had these watches and rings and that sort of thing, and Mr. Reilly rarely admitted that. He admitted that he had an agreement with Mr. Douglass and if that wasn't his agreement that he would pay him back. And then all of a sudden --

JUDGE PENNELL: Well, he didn't readily admit it. I mean, he said that Mr. Douglass gave him these things, and the testimony was that that was not true. That he didn't give him those things. The diamond ring, he also told the places that he sold the rings to that he'd inherited it, and then claimed on the stand some of it was given to him some of it was found on the side of the road. So, the jury could also see that he was making inconsistent statements, regarding thefts from Mr. Douglass.

MR. FREEBOURN: Well, when you are talking about this, we're talking about proving -- it's not proving one huge claim. We're

talking about proving individual claims.

JUDGE PENNELL: Mm-hm [affirmative]

MR. FREEBOURN: And then with regard, the property that we're talking about with the jewelry and the watches and those sort of things, were completely different than the allegation with regard to the safe. And that was one of the reasons why we made the motion to bifurcate. Is like you're doing now, you're making a causal link between all of these other events that prove this one big event. Which has nothing to do with it. And most of what you're talking about heard years prior to. And so when we're looking at each individual act, it's -- each one of those claims would have to be, you know, proven. And like we've started out talking about with regard to the watch. Mr. Reilly had the watch. Mr. Douglass says that's my watch. There's an argument about a possessory interest in whether he interfered with that. With regard to the money, that's completely absent. And we have the situation where we're talking about, we started out talking about the amount of money and whether he could prove that. The most bizarre set of circumstances occur. When the money's found it's removed from the scene. Somebody counts it. The police never see it. No one knows what the actual amount of the money is. No one -- and when you ask Mr. Douglass about the actual day when it happens. He says he's there. He's not. He's in France. And so, all of these things together --

JUDGE PENNELL: You are into your rebuttal time with 2:43 left.

Do you want to --

MR. FREEBOURN: No thank you.

JUDGE PENNELL: --reserve that? Okay, thank you.

MR. HASSING: Thank you. And good morning, your honors. May it please the court, my name is Steve Hassing. I represent Harlan Douglass. I'm reminded of the old adage in, I don't want to be presumptuous, but if you feel like you're winning maybe you shouldn't say too much and screw it up, but… in any event, I just want to touch on -- to begin with, this idea of the Westview case. Which relates to conversion and says you have to identify the money that was stolen, on and on. That case also says, unless the money was stolen in one lump sum, alright, and that's exactly what happened with the safe. So, we can obviously establish conversion, if we can satisfy the other elements. Which we have done. With regard to any comments Lisa Douglass may have had to the police, or given to the police; she actually testified in court, she didn't know the exact amount of money and she was guessing as she talked to the police, no big deal. That the amount of money comes from Jerri Via, who counted two boxes of money. Her testimony was, that in the first box there was $540,000. Excuse me, in the first box there was a $264,000 --

JUDGE PENNELL: That's what I thought.

MR. HASSING: Because there was a slip of paper that said that --

JUDGE PENNELL: Right.

MR. HASSING: -- when it was found. The second box was also counted. And the two boxes together were between 500 and 550. So, it wasn't that there was $264,000 in half the boxes, that was in one box, obviously. You sound like you know the facts better than I do anyway. But with regard to the proof, yes, we proved that he stole the money from the safe. We -- our burden was preponderance of the evidence. More probable than not. You know, when you take a look at the evidence that we had, just out there in the field when he found the money; Harley and Lisa and Reilly were finished for the day. It was starting to get dark. They were leaving. They were going back to the parking lot where Harley's truck was. And all of a sudden, for no reason, Mr. Reilly says, "Oh, I think maybe I'm going to go back. I think maybe this ditch has something to do with it." Well, he rides off on his four-wheeler, and within minutes he comes screaming back yelling, "I see a bag with 50s and 100s. I see 50s and 100s." At trial, he says, I couldn't see what was in the bag it was covered with pine needles. When Lisa Douglass and Reilly got there, he testified at court he still couldn't see what was in the bag, until Lisa moved the pine needles. She testified she still couldn't see it until she dug into the bag and tore it open. So, the question is, how did Reilly know where the money was buried? How did they search this area, not find it, and then leave; and then all of a sudden Reilly says, wait a minute, I've got an idea. Something might be over here. He goes over there,

right to it, and finds it like that. How does that happen if he wasn't the one that put it there? But even more compelling, how does he know what's in the bag? He's sitting on a four-wheeler, he's 15 yards away from the bag. He sees a little white object, that he assumed was a bag, and he doesn't investigate. He takes off and goes and finds Lisa and Harley and says, "I think I found it. I see a bag with 50s and 100s in it." How did he know there was 50s and 100s in it, when he couldn't see what was in the bag until Lisa came up and moved the pine needles? So obviously, that's sufficient evidence to allow the jury to conclude that it was more probable than not that Reilly put the money in the bag, and hid the bag; and in order to do that, he had to have possession of the money.

JUDGE PENNELL: There could be a number of things that are convincing to different people that. You have a question Judge Korsmo?

JUDGE KORSMO: Yes, I do. Counsel, I'm going to change gears here. Why the heck did you risk the mistrial by asking about the pending charges?

MR. HASSING: Well, that's a good question and my client asked me the same thing that day. First of all, I want to --

JUDGE KORSMO: I mean, you were darn lucky Judge Cooney just didn't bang it out and, you know --

MR. HASSING: Except for one thing --

JUDGE KORSMO: -- kick you down the road.

MR. HASSING: Except for one thing, your honor. We had motions in limine. And in the motions in limine, I had made a couple of motions that certain things shouldn't be brought up like Harley --

JUDGE KORSMO: But right, but you know, and I understand the technical argument about the Judge not actually ruling off of that--

MR. HASSING: Right.

JUDGE KORSMO: --that's where Judge Cooney hung his hat, but why as a trial practitioner would you even risk it?

MR. HASSING: Well, in hindsight, might not have been my best move in that trial. But, you know, I've done over 100 trials and I've made mistakes in every one of them. And this one here, I didn't get caught on. And, I mean by caught on, the Judge didn't call a mistrial, so the Judge had his own reasons for not calling a mistrial and that's because he knew that there was no such order. I realize he still could have.

JUDGE KORSMO: But, right, even if there hadn't been a discussion in the motion in limine, though, this just being the first question to ask.

MR. HASSING: Well, I can't argue with you, your honor, you're right on that.

JUDGE KORSMO: Just curious.

MR. HASSING: I made probably a number of mistakes in that trial, but, yeah, you hit on one of them.

JUDGE PENNELL: I had a question, it wasn't -- I can't recall from the facts, the alarm system that was put in to place on the 20 -- you know, in September, was there a previous alarm system in the house ever, or was that the very first alarm system?
MR. HASSING: That was the very first alarm system. And that was the very first safe.
JUDGE PENNELL: Right, well, so that's what we -- when you were talking before, I think we all hang our hats on different things. I find persuasive, the prior act evidence showing this common planner scheme to secrete property over the course of time. That comes to a head, once the alarm system, that has various key fobs and codes that would track who is coming in and out of the house. You don't focus on prior bad act evidence being relevant to prove identity, common planner scheme, and motive. Why is that?
MR. HASSING: I didn't think I needed it. I mean, they were making the case, trying to make the case, that these bad acts should not have come in. That the trial should have been bifurcated. I made an argument, a counter argument, that the Judge had good reason not to bifurcate the case. He didn't have to under the code. More witnesses had to come back. But I didn't want to then belabor the point. And you'll notice in my argument, I didn't argue that one of the things that the jury -- I touched on it, but I didn't make a big issue of the fact that they also found that he stole $98,000 in jewelry, $96,000 in

cash. The one thing I did point out, is that these guys didn't appeal that part of it. He's obviously a thief. We proved he was a thief. And I just didn't want to belabor that point. I didn't think I needed to; we've got a mountain of other evidence.

JUDGE PENNELL: Like I said, I think some things are, perhaps, more persuasive to some people than others. I didn't know if there was a legal reason for avoiding it. But it seems to me that that's a big difference between Mr. Reilly and everybody else. He seemed to have been regularly stealing and this seems to have been one last big hoorah.

MR. HASSING: Right.

JUDGE PENNEL: It's just your classic ongoing crime sort of evidence.

MR. HASSING: Yeah. Yeah, in fact, the last theft of the cash from the house, prior to the theft from the safe, I think was like 30 days, 60 days. Something like that. It was very close. I mean, this happened over two years. But the very last one, prior to the safe, was close in time, so the case shouldn't have been bifurcated. But I thought the strongest evidence was the fact that he found the money, after the search concluded, and he knew what was in the bag. I don't think we need any more than that.

JUDGE KORSMO: Is a quarter of a million dollars heavy?

MR. HASSING: Well, I've never lifted a quarter of a million. You'd have to ask Mr. Reilly.

MALE JUDGE: Well, I've never had the chance either but --

MR. HASSING: Mr. Reilly could tell you --
MALE JUDGE: Does it make sense that somebody would abandon that much money, just because the rest of it was so heavy or something?
MR. HASSING: Oh, no, no, no, no, no, absolutely not. There's no evidence on why that 300 and some thousand was buried. I've got my own theory. If you'd like to hear my theory I'll give it to you, but just not in the record.
MALE JUDGE: He wanted to make it look like he was cooperating and helping to solve the crime, so that they wouldn't think he was the one doing it.
MR. HASSING: Exactly.
JUDGE PENNEL: He might have seen happened to Ms. Weiland, that when she said, "Look, I found this money, I didn't take any." And she was still trusted after that.
MR. HASSING: That's my theory.
Any other questions?
MALE JUDGE: Are you going to be able to collect the judgment?
MR. HASSING: Well, that's a good question and I doubt it. But that doesn't mean it should be set aside, obviously.
MALE JUDGE: Okay, fair enough.
MR. HASSING: We're going to collect it and we're going to renew it every 10 years.
MALE JUDGE: Fair enough. Mr. Brant (phonetic) will help.
MR. HASSING: Mr. Brant will probably get to -- pull the laboring

oar on that.

MALE JUDGE: Okay.

MR. HASSING: Thank you.

MALE JUDGE: Assuming we affirm.

MR. HASSING: [Laughter] unintelligible

MR. FREEBOURN: With regard to your question, Justice Korsmo, it was clear that there was an understanding that that wouldn't be mentioned with regard to him being charged with 6 felonies. In addition, we had argued evidence rule 404(b) and 609; which both prohibits that type of question in a trial. There was no limiting instruction from Judge Cooney to -- or to trial court to say that that wasn't true. So, from the get-go, we started at a position that I don't believe that we were ever able to overcome. With regard to going back to the security alarm, it wouldn't matter. There were nine people in the house that day. None of which were Mr. Reilly. If it was set, if it wasn't set; it didn't matter. Judge Tompkins had ruled on summary judgment. We won summary judgment, so they had to prove that this occurred between 2 o'clock and 3:25 on September 25; because all of the evidence showed that Reilly couldn't have done it after 3:25 and he couldn't have done it prior to 2 o'clock. Missy Douglass, Lisa Douglass, testified at trial that there were 9 people working on the house that day. Presumably, between 2-3:00 PM. He couldn't have taken the money. That was all that was in this case. So, I don't want it to be lost on the court that we had

won summary judgment in this case and that they were only limited to an hour and 25 minutes.

MALE JUDGE: That, that's covered by the jury verdict. Right?

MR. FREEBOURN: Correct.

MALE JUDGE: That you had to prove between those two times.

MR. FREEBOURN: That, and if you look at Mr. Hassing's brief, the seven pieces of circumstantial evidence, which is the only evidence that he had; to show that Mr. Reilly did it between that period of time, that I went over in my initial argument, none of those things show that he was in the house between that period of time. With regard to the, once again, Mr. Reilly finding the money; once again, I know that this sounds like a criminal case, it sounds like a theft, it sounds like Dateline story or something. But the fact of that matter is, is that it's beyond being just the most bizarre set of circumstances, it's a conversion case. And in the conversion cases is the example that I gave you when I started out. You have my car, I want my car back. And we're fighting over something that we actually know the other person has. Otherwise, every single person here can walk out of the courtroom, say that they have an amount of money; never have to prove that they have it; and then never have to show the other person has it. And that would be the law. And that can't possibly be the law.

JUDGE PENNELL: Well, it is certainly true in criminal cases if there's a theft, there has to be, there has to be property

proof. Just to reassure you, that the criminal law is not different in that way. But thank you very much for your presentation.

MR. FREBOURN: Thank you.

I, Heather Stuart, a resident in the State of Washington, residing in Spokane Valley, do hereby certify this transcript is true and correct, including all questions, answers, and objections.

I further certify that I am not a relative or employee of any parties related to this matter, nor am I financially interested in the outcome of this matter.

Heather K. Stuart

Heather K. Stuart

Dated this 26 day of August 2020

ROBERTS FREEBOURN

September 11, 2020 - 2:21 PM

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