68725-5

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NO. 68725-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEONARD PEGS, Jr.,
JAMES EDWARD BALLOU, II

Appellant(s).

BRIEF OF RESPONDENT

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I. ISSUES

1. The trial court found that the surveillance video was not material exculpatory evidence, that any potentially useful value of the surveillance video was mere speculation, that the surveillance video was lost or destroyed while in the possession of by Toys R Us, and that there was no bad faith on the part of the State. Did the trial court correctly deny defendants' motion to suppress evidence and dismiss the charges?

2. Did the trial court abuse its discretion by admitting testimony regarding the contents of the lost or destroyed video surveillance recording?

3. Did the trial court abuse its discretion by admitting testimony identifying defendant from the video surveillance recording?

4. The trial court permitted a witness to testify that he had met defendant in the past. The trial court concluded that the act occurred; that the purpose the State sought to introduce the evidence was to show the witness recognized defendant; that the evidence was relevant to the jury's assessment of the witness' credibility; and that any prejudice was outweighed by the probative

value. Did the trial court abuse its discretion in admitting the statement?

5. Did the trial court's instructions, taken in their entirety, correctly state the applicable law and fairly allow the parties to argue the case?

6. Did the trial court abuse its discretion in finding the Parenting Sentencing Alternative was not appropriate under the facts of this case?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On November 1, 2009, best-friends, Leonard Pegs, Jr. and James Edward Ballou, II, were at Pegs' house in Edmonds, WA. Also present was Guadalupe Zamudio, who lived with Pegs. Pegs and Ballou told Zamudio that they were going Christmas shopping at Toys R Us in Lynnwood, WA. Zamudio asked Pegs to get some boxes for moving. 3RP 352-355.

Pegs and Ballou arrived at Toys R Us around 1:00 p.m. and separated from each other. Ballou was observed in the R Zone. The R Zone is the department where Toys R Us keeps the high value electronics. Items over $30 are kept locked in glass cases. The R Zone is isolated from the rest of the store with a separate

entrance. There is always a cashier assigned to the R Zone. On November 1, 2009, there were two employees dedicated to working the R Zone. However, around 1:00 p.m. one employee was on break with only Anthony working the R Zone. Ballou asked Anthony to show him some keyboards in the music section outside the R Zone. Anthony asked department supervisor, Christopher Blaine, to assist Ballou. When Blaine offered to help, Ballou replied never mind. This behavior made Blaine suspicious and he contacted the store manager, Darin Jorgensen, who came over to area. Jorgensen observed Ballou walking back and forth in the R Zone talking on his phone. Jorgensen had met Ballou in the past. Based on his observation and Blaine's information Jorgensen alerted other employees that they had a possible theft situation, a "Code Jeffrey." The Toys R Us procedure for a Code Jeffrey was to offer the person "Great Customer Service." Employees focus on the person, offer assistance to the person, stay nearby and make sure the person knows that employees are available to help them. Ballou remained in the R Zone area. 1RP 79-81, 94, 112-113; 3RP 84-92, 97-99, 144, 153, 173-174, 293-300.

Blaine moved to the service area near the front of the store and saw Ballou pushing a cart with a brown box towards the exit

with Pegs following close behind. Blaine alerted Jorgensen, who was at the front of the store. Blaine then went to try to find out where the box came from. Jorgensen observed Ballou pushing a cart with a brown Toys R Us box, with Pegs along side. Jorgensen recognized the box as one used for high value electronics that were kept in a locked storeroom.[1] Jorgensen observed Ballou push the cart and the box past the registers and out of the store without paying for anything. Jorgensen yelled for Pegs and Ballou to stop, but they sped up. Jorgensen ran out of the store and called 911 on his cell phone. Jorgensen observed both Pegs and Ballou lift the box out of the cart and place it in the trunk of a Jaguar. Jorgensen observed the Jaguar sink down from the weight of the box being placed in the trunk. Jorgensen was speaking loud enough for Pegs and Ballou to hear him when he advised 911 of the Jaguar's color and license number and gave a physical description of Pegs and Ballou. Jorgensen advised 911 that the Jaguar headed north on Alderwood Parkway when it drove out of the parking lot. 1RP 81-83; 3RP 99-101, 106-111, 140, 144-146, 150-151, 300-302.

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[1] Toys R Us received electronic products by direct shipment via FedEx and UPS. Their other product was shipped on Toys R Us trucks. The electronics boxes were marked with red and white tape and taken directly to the storeroom in the R Zone. Once the product is removed, the electronics box is broken down before it is taken from the storeroom. This is done for internal security. Electronic boxes are never given to customers. 3RP 100-102, 139-140, 161, 174-176, 337.

Blaine reviewed the store's video surveillance to determine where the box Pegs and Ballou took from Toys R Us came from. On the video surveillance Blaine observed Pegs go into the R Zone and proceed to the storeroom door at the back of the R Zone. This corresponded with the time when Ballou was talking to Anthony. The storeroom door is always kept closed,[2] it automatically locks and can only be opened with a key. The storeroom door had a sign posted; Authorized Personnel Only. Pegs opened the door and entered the storeroom. Blaine switched views on the video surveillance to the inside of the R Zone storeroom. Pegs unloaded product from a box in the storeroom and then loaded Nintendo game consoles into the box. After loading the box with the game consoles, Pegs periodically looked out the window in the door and talked on his cell phone. At the same time Ballou was outside talking on his cell phone. After about a minute Pegs removed the box loaded with game consoles from the storeroom. Ballou pushed a cart into the R Zone and the box loaded with game consoles was put on the cart. Ballou pushed the cart with the box out of the R Zone towards the store exit and out of the store. Pegs was walking

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[2] Defendants' claim that Blaine admitted seeing the storeroom door left open is incorrect. Appellant's Brief (Pegs) 32, (Ballou) 17. Blaine was referencing the computer room door located next to the storeroom. 3RP 318-319.

along with Ballou. 1RP 85, 90, 103-111; 3RP 101-102, 149, 302-303, 308-315, 321, 343.

Jorgensen returned to Toys R Us and reviewed the store's video surveillance. The video surveillance system used by Toys R Us at the time had 16 cameras, four camera shots could be viewed simultaneously or each camera shot could be viewed separately. Jorgensen identified the portions of video that showed Pegs and Ballou. Pegs and Ballou entered Toys R Us close in time, but separately. The both went straight to the R Zone. Jorgensen saw on the video the same things he observed Ballou doing earlier. Jorgensen also saw Pegs on the video. Pegs went to the R Zone storeroom alone. Pegs could be seen making a twisting motion with his arm. While Pegs was at the door Ballou was talking to Anthony, the R Zone employee. Pegs opened the door, entered the storeroom and the door closed. No one else was in the storeroom with Pegs. Pegs took a box in the storeroom, emptied the product out of the box, and loaded Nintendo game consoles into the box. After loading the box with the game consoles, Pegs appeared to be talking on his cell phone. Ballou then appeared with a cart and pushed the cart up to the storeroom door. Pegs opened the door and the box was place on the cart. Ballou pushed

the cart with the box and Pegs followed. Jorgensen saw himself on the video at the front of the store, Pegs and Ballou looked at him and then left the store. Neither Pegs nor Ballou had permission to enter the R Zone storeroom, nor did either have permission to take the box or the Nintendo game consoles. 1RP 62-66, 69-75, 87-88, 95-99, 106; 3RP 112-124, 126, 138, 155-156, 176-177, 183, 190-191, 314-315, 342-343.

Jorgensen had Blaine determined how many Nintendo game consoles were taken by Pegs and Ballou by watching the surveillance video and performing an audit of the merchandise in the store. Jorgensen verified the audit and that items were missing. The total value of the loss came to $5,779.62. 1RP 89; 3RP 126-132, 159-161, 191-192, 314.

Officer Gann was dispatched to Toys R Us in response to Jorgensen's 911 call. Based on the information he received from dispatch, Officer Gann drove north on Alderwood Parkway looking for the black Jaguar. When he got to 164th Street without seeing the Jaguar Officer Gann turned around heading south back to Toys R Us on Alderwood Parkway. About half way back Officer Gann observed the Jaguar northbound on Alderwood Parkway. Officer Gann turned around, heading north, and stopped the Jaguar near

164th Street. The occupants of the Jaguar matched the physical description relayed by dispatch. The driver was identified as Pegs and the passenger identified as Ballou. Jorgensen was transported to the location and confirmed that Pegs and Ballou were the individuals he observed taking property from Toys R Us. The Jaguar was impounded. Officer Gann obtained a search warrant for the Jaguar. The Jaguar was searched on November 2, 2009. The Toys R Us box was located in the trunk; it was empty. 1RP 23-29, 51-53; 3RP 124-125, 154, 186, 212-223, 231-233.

After concluding his contact with Pegs and Ballou, Officer Gann went to Toys R Us and contacted Jorgensen. Officer Gann viewed the video surveillance recording with Jorgensen in the security office. On the video surveillance Officer Gann observed Pegs and Ballou enter Toys R Us. Pegs walk to the storeroom door and gain access to the storeroom. Officer Gann observed Pegs inside the storeroom unload items from a box that was in the storeroom and then load merchandise into the box. No one else was in the storeroom with Pegs. Pegs then took the box and left the storeroom. After viewing the video surveillance Officer Gann went and looked the storeroom. Officer Gann requested a copy of the video surveillance. Jorgensen said that he was not able to

make a copy, but that he would get him a copy as soon as he could. Officer Gann contacted Jorgensen the next day to retrieve a copy of the video surveillance. Jorgensen advised him that he was having technical problems with the recorder making a copy. Officer Gann did not take the video surveillance recorder because it would have left Toys R Us with no surveillance capability. Toys R Us never informed Officer Gann that the video surveillance recording was going to be destroyed. Officer Gann never received a copy of the video surveillance. 1RP 29-44, 47-49, 53-56, 78, 87; 3RP 125-126, 132-133, 137, 223-228, 234-236.

Jorgensen tried to make a copy of the video surveillance. The CD drive was unresponsive. When he tried to put a CD into the recorder the eject button did not work. Jorgensen submitted a repair request through the Toys R Us service channel. Jorgensen explored the possibility of using a camcorder to record the screen. He learned that recording a CRT screen does not work; all you get is weird flickering and geometrical problems. A service technician from the vendor who serviced the equipment looked at the video surveillance recorder and determined that it could not be repaired. Because of other problems with the recorders, Toys R Us was in the process of replacing them. A few weeks later the recorder was

replaced by the vendor. 1RP 66-69, 75, 79, 86; 3RP 133-138, 157-159, 195.

B. PROCEDURAL HISTORY.

On January 6, 2011, Pegs and Ballou were charged as co-defendants with first degree theft. CP 208-209, 324-325. On December 1, 2011, Pegs' and Ballou's cases were consolidated. CP 326. On December 2, 2011, the State filed amended informations charging Pegs and Ballou with second degree burglary and first degree organized retail theft. CP 111-112, 320-321.

On December 2 and 5, 2011, the trial court heard defendants' motions to dismiss for failure to preserve the video surveillance recording and governmental misconduct; and motions to exclude witnesses from testifying about what they observed on the video surveillance recording under Evidence Rules (ER) 701, 1002, and 1004. Testimony was taken at the hearing. CP 113, 136, 144-155, 188; 1RP 5-7, 11-116.

On December 7, 2011, the trial court denied defendants' motions finding the video surveillance recording was not material exculpatory evidence and the defendants could obtain comparable evidence by interviewing the witnesses; the video surveillance recording was not potentially useful evidence and that there was no

evidence of bad faith in the loss or destruction of the recording and no governmental misconduct. The court concluded that the best evidence rule did not apply, that testimony regarding the contents of the recording was not excluded, and that witnesses could express their opinion as to the identity of subjects seen in the video. CP ___ (sub# 46 and 47, Certificate Pursuant to CrR 3.6); 1RP 166-176. The case proceeded to trial and ended in a mistrial because of juror misconduct. CP 250-251; 2RP 2-3.

On February 23, 2012, the State filed second amended informations charging Pegs and Ballou with second degree burglary, effectively dismissing the charges of organized retail theft. CP 109-110. The case proceeded to trial on March 26 – 29, 2012. 3RP 3-500.

On the first day of trial the court heard motions in limine. The trial court excluded any evidence of other crimes, wrongs, or acts of Pegs and Ballou. 3RP 60-61. There was a joint motion in limine by the parties regarding Jorgensen's prior contacts with Ballou. 3RP 15-28. The trial court ruled that Jorgensen could testify: "I have met Mr. Ballou in the past. I recognized him." 3RP 28-29. The trial court found that the testimony was relevant to the jury's assessment of the witness' credibility. 3RP 21-22.

At the conclusion of trial the jury found both Pegs and Ballou guilty as charged of second degree burglary. 3RP 489-495. Sentencing for Pegs and Ballou was held on May 3, 2012. Pegs had an offender score of 10 giving him a standard sentence range of 51 to 68 months. Ballou had an offender score of 9 giving him a standard sentence range of 51 to 68 months. Pegs asked the trial court to consider giving him a sentence under the Parenting Sentencing Alternative (PSA), RCW 9.94A.655. The trial court heard testimony from Pegs, Guadalupe Zamudio—the mother of Pegs' child, Chris Banchero—the general manager where Pegs worked, Denise Hollenbeck—the person who wrote the Department of Corrections Risk Assessment, and the argument of counsel. The court declined to authorize a PSA for Pegs. The court sentenced both Pegs and Ballou to 51 months confinement. 4RP 2-36.

III. ARGUMENT

A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Briejer, ___ Wn. App ___, 289 P.3d 698, 705 (2012); State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). A trial court abuses its discretion if its evidentiary ruling is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Williams, 137 Wn. App. at 743, quoting

State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). The party challenging an evidentiary ruling bears the burden of proving the trial court abused its discretion. Williams, 137 Wn. App. at 743. A trial court's evidentiary ruling may be upheld on the grounds the trial court used or on other proper grounds the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); Williams, 137 Wn. App. at 743.

A. PRESERVATION OF EVIDENCE.

Pegs argues that the failure to preserve the video surveillance recording violated his right to due process. Appellant's Brief (Pegs) at 20-23.

The Fourteenth Amendment of the United States Constitution and article 1, §3 of the Washington State Constitution requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense. To comport with due process, the prosecution has a duty to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense. State v. Wittenbarger, 124 Wn.2d 467, 474-475, 880 P.2d 517 (1994), citing California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)

and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

1. Two Different Tests - Materially Exculpatory Evidence vs. Potentially Useful Evidence.

Whether destruction of evidence constitutes a due process violation depends on the nature of the evidence and the motivation of law enforcement. State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011) review denied, 173 Wn.2d 1026, 272 P.3d 852 (2012). The preliminary determination of whether the evidence is materially exculpatory or potentially exculpatory is essential because there are different tests for determining whether the loss or destruction of evidence constitutes a due process violation. Which test is applied depends on whether the evidence in question is materially exculpatory evidence or potentially useful evidence.

a. Materially Exculpatory Evidence.

The State's failure to preserve "material exculpatory evidence," requires the dismissal of criminal charges. Groth, 163 Wn. App. at 557. However, "material exculpatory evidence" is a very narrow category. The Court has established a two-prong test for determining material exculpatory evidence:

> In order to be considered "material exculpatory evidence", the evidence must both possess an exculpatory value that was apparent before it was

> destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) citing Trombetta, 467 U.S. at 489. Under the facts of the present case, defendant has failed to meet his burden.

While the preservation of the video surveillance recording might have conceivably contributed to defendant's defenses, a dispassionate review of the evidence in the present case leads to the conclusion that the chances are basically zero that the video surveillance recording would have been exculpatory. The several witnesses who viewed the video surveillance recording before it was lost said that it showed Pegs and Ballou in Toys R Us, Pegs loading Nintendo game consoles into a box, Pegs and Ballou putting the box on a cart, and Ballou pushing the cart past the check-out registers without paying, while Pegs walked along side. The video surveillance recording clearly provided inculpatory evidence. There was no indication that the video surveillance recording would provide any exculpatory evidence. The exculpatory value of the video surveillance recording was not apparent.

Further, defendants had the opportunity, and in fact did, interview and cross examine the witnesses who viewed the video surveillance recording. Defendants did highlight the inconsistencies in the witnesses' memories to raise doubts in the mind of the fact finder whether the witnesses' recollections were accurate or credible. Trombetta, 467 U.S. at 490; Wittenbarger, 124 Wn.2d at 476.

b. Potentially Useful Evidence.

The video surveillance recording was at best only potentially useful evidence. Wittenbarger, 124 Wn.2d at 477; State v. Donahue, 105 Wn. App. 67, 77-78, 18 P.3d 608, review denied, 144 Wn.2d 1010 (2001). "If the evidence does not meet this test and is only 'potentially useful' to the defense, failure to preserve the evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the State." State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001), citing Wittenbarger, 124 Wn.2d at 477 and Youngblood, 488 U.S. at 58; Groth, 163 Wn. App. at 557.

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the

time it was lost or destroyed." Groth, 163 Wn. App. at 558; Youngblood, 488 U.S. at 58. Thus, a defendant must show the destruction "was improperly motivated." Groth, 163 Wn. App. at 559; Wittenbarger, 124 Wn.2d at 479. Here, defendant has not made such a showing. There is no indication that the police knew of any exculpatory aspect of the video surveillance recording. The witnesses who viewed the video surveillance recording confirmed the inculpatory nature of its contents. Nor was there any indication that its loss or destruction was improperly motivated. Further, the police were not involved in the loss or destruction of the video surveillance recording.

In the present case, when the Toys R Us manager discovered that the video recorder was unable to make copies he sent a service request through the proper channel. The service technician determined that the video recorder was broken and needed to be replaced. Due to other problems with the surveillance system, Toys R Us was in the process of updating the video surveillance system through a vendor. The video surveillance recorder was replaced by the vendor and the original unit was lost or destroyed. CP ___ (sub# 46 and 47, Certificate Pursuant to CrR

3.6) at 4-6; 1RP 35-39, 67-69, 86-87; 3RP 132-138, 156-159, 227-231.

To the extent any conclusions can be drawn from the record, it appears Toys R Us inadvertently destroyed evidence of which no exculpatory value was apparent. The police took appropriate steps to obtain a copy of the video surveillance recording. Even though the police requested a copy of the video surveillance recording on multiple occasions, the State never possessed a copy of the video surveillance recording. The video surveillance recorder was lost or destroyed while it remained under the control of Toys R Us. The police were never notified by Toys R Us that the video surveillance recorder was being replaced or that the recording would be destroyed. The fact that the police did not obtain a copy of the video surveillance recording was not intentional, reckless, or negligent. There was no bad faith on the part of the State. This does not meet the standard of bad faith required under Youngblood and Wittenbarger. Groth, 163 Wn. App. at 559. Since defendant has not shown the evidence was destroyed in bad faith, there was no due process violation. Groth, 163 Wn. App. at 558.

The trial court correctly found that the defense failed to prove that the video evidence possessed by Toys R Us was material

exculpatory evidence. Further, the trial court found any potentially useful value of the video was mere speculation, and that there was no bad faith on the part of the State. CP ___ (sub# 46 and 47, Certificate Pursuant to CrR 3.6) at 7-8. Defendant does not challenge the trial court's findings of fact. Unchallenged findings of fact are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009), citing State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); State v. Lorenz, 152 Wn.2d 22, 36 93 P.3d 133 (2004); State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

B. ADMISSION OF OTHER EVIDENCE OF THE CONTENTS OF THE LOST OR DESTROYED SURVEILLANCE VIDEO.

Pegs argues that witness testimony regarding the contents of the video surveillance recording was inadmissible under the best evidence rule. Appellant's Brief (Pegs) at 23-26. The trial court's decision to admit this kind of evidence will not be disturbed on appeal absent an abuse of discretion. State v. Detrick, 55 Wn. App. 501, 503, 778 P.2d 529 (1989).

Evidence Rule (ER) 1004 provides in pertinent part:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

> (a) **Original Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith [.]

ER 1004(a). As shown above the video surveillance recording was not lost or destroyed by the State; the video surveillance recording was lost or destroyed by Toys R Us. See III, A, above. Toys R Us was the victim of the crime, not the proponent of the evidence. The State has the burden of producing evidence of guilt and, therefore, the State is the proponent of evidence introduced against a criminal defendant. Detrick, 55 Wn. App. at 503. Accordingly, since the proponent did not destroy the video surveillance recording at issue in the present case, ER 1004(a) is not an impediment to the introduction of this evidence. The trial court did not abuse its discretion by admitting testimony regarding the lost or destroyed video surveillance recording. Detrick, 55 Wn. App. at 504.

Pegs reliance on Commonwealth v. Lewis, 424 Pa.Super. 531, 623 A.2d 355 (1993) and United States v. Bennett, 363 F.3d 947, 64 Fed.R.Evid.Serv. 467 (9th Cir. 2004) is misplaced. In Lewis the party proponent had not shown that the evidence was lost or destroyed. The explanation for the unavailability of the video tape was that store security officer was unable to locate the video tape because they were stored in the store basement and the

classification system was imprecise. The court found that the explanation regarding the unavailability of the video tape was unsatisfactory. Lewis, 424 Pa.Super. at 537-538.

Likewise, in Bennett the State failed to satisfactorily explain the unavailability of GPS or its data. The witness simply stated that he was not the custodian of the GPS. The State offered no evidence that it would have been impossible or difficult to download or print out the GPS data. In contrast to the present case, the State provided ample evidence that the video surveillance recording had been lost or destroyed.

C. ADMISSION OF SUSPECT'S IDENTIFICATION FROM VIDEO SURVEILLANCE.

Pegs argues that the trial court erred by allowing witnesses to testify that they recognized Pegs from the video surveillance recording. Appellant's Brief (Pegs) at 16-19.

"The Washington Rules of Evidence permit lay opinion testimony when (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." ER 701; State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). A lay witness may give an opinion, so long as it is rationally based on the witness' perceptions

and helpful to the jury. ER 701. The trial court is vested with wide discretion under ER 701. State v. Kinard, 39 Wn. App. 871, 874, 696 P.2d 603 (1985). "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." Hardy, 76 Wn. App. at 190 (citations omitted); Kinard, 39 Wn. App. at 874.

In the present case, witnesses' identification of Pegs was rationally based on their perception and helpful to a clear understanding of their testimony or the determination of a fact in issue. Jorgensen observed Pegs leaving the store with Ballou and placing the box in the trunk of Pegs' Jaguar. Jorgensen was taken to the location where Pegs and Ballou were stopped and identified them as the individuals he saw exiting the store and placing the box in the trunk of Pegs' Jaguar. Jorgensen testified that he watched the video surveillance recording several times and identified Pegs as the person in the storeroom loading product into the box, and helping to place the box on the cart. Blaine observed Pegs leaving the store with Ballou who was pushing the cart with the box. Blaine testified that he watched the video surveillance recording and

identified Pegs as the person in the storeroom loading product into the box and helping to place the box on the cart. Based on the description given by dispatch Officer Gann stopped the Jaguar and detained the occupants, Pegs and Ballou. Officer Gann was present when Jorgensen identified Pegs and Ballou as the individuals he saw exiting the store and placing the box in the trunk of Pegs' Jaguar. Officer Gann watched the video surveillance recording and identified Pegs as the person in the storeroom loading product into the box. The identification testimony of Jorgensen, Blaine and Officer Gann was helpful to the jury in determining whether Pegs was the person in the video surveillance recording. The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. Hardy, 76 Wn. App. at 192, citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). The trial court did not abuse its discretion by admitting testimony identifying Pegs from the video surveillance recording.

D. THE EVIDENCE THAT A WITNESS HAD MET DEFENDANT IN THE PAST WAS PROPERLY ADMITTED.

Pegs and Ballou argue that the trial court abused its discretion by admitting Jorgensen's testimony that he had met

Ballou in the past. Appellant's Brief (Pegs) at 26-32; (Ballou) at 11-17. Defendants' argument is not persuasive. Jorgensen's testimony was relevant and probative, and the trial court properly determined that its probative value outweighed its prejudicial effect.

In response to a joint motion in limine the trial court ruled that Jorgensen could testify: "I have met Mr. Ballou in the past. I recognized him." 3RP 28-29. The trial court found that the testimony was relevant to the jury's assessment of the witness' credibility. 3RP 21-22. Relevant evidence need only make the existence or nonexistence of a material fact "more or less likely." ER 401; State v. Israel, 113 Wn. App. 243, 267, 54 P.3d 1218 (2002). The trial court excluded any evidence of other crimes, wrongs, or acts of Pegs and Ballou. 3RP 60-61.

"Once a court has determined that evidence is relevant, the court must weigh any prejudice the evidence will have against its probative effect. ER 403." Israel, 113 Wn. App. at 268. While Pegs and Ballou assert that Jorgensen's testimony was highly prejudicial, they have not identified any unfair prejudice that outweighed the probative value of this evidence. The prejudicial nature of the testimony was slight to nonexistent, while the probative value was high. The trial court did not abuse its

discretion in admitting Jorgensen's testimony that he had met Ballou in the past.

Defendants argue that Jorgensen's statement should have been excluded under ER 404(b). That rule 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, or absence of mistake or accident.

ER 404(b) prohibits the admission of "evidence of other crimes, wrongs, or acts" to prove the "character of a person" in order to show the person "acted in conformity therewith." Jorgensen testified that he had met Ballou in the past.[3] 3RP 86. This statement was not evidence of other crimes, wrongs, or acts; it did not demonstrate the character of Ballou; nor show that he acted in conformity therewith.

Even if Jorgensen's statement is considered ER 404(b) evidence, the rule does permit the admission of evidence of other crimes, wrongs, or acts for other purposes. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002);

[3] While the defense was aware of the context in which Jorgensen had met Ballou in the past, no evidence was presented to the jury regarding that context.

State v. McCreven, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). Defendants denied involvement in the crime committed against Toys R Us. Identity is an issue when the accused denies any involvement in the charged crime. Foxhoven, 161 Wn.2d at 178.

Before admitting ER 404(b) evidence, a trial court must (1) find by a preponderance of the evidence that the act occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. Foxhoven, 161 Wn.2d at 175. This analysis must be conducted on the record. Id. The trial court is not required to conduct an evidentiary hearing and may assess admissibility on offer of proof to determine whether alleged uncharged acts probably occurred prior to admitting evidence of other crimes, wrongs, or acts. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for abuse of discretion. Foxhoven, 161 Wn.2d at 176; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. McCreven, 170 Wn. App. 444, 457, 284 P.3d 793 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds

or reasons. Powell, 126 Wn.2d at 258. The reviewing court will not disturb a trial court's ruling on the admissibility of evidence if it is sustainable on alternative grounds. McCreven, 170 Wn. App. at 457, citing State v. St. Pierre, 111 Wn.2d 105, 119, 759 P.2d 383 (1988).

1. Motion To Exclude Jorgensen's Statement That He Met Ballou In The Past.

In ruling on the motion to exclude Jorgensen's statement that he met Ballou in the past the trial court concluded that the act occurred; that the purpose the State sought to introduce the evidence was to show that Jorgensen recognized Ballou; that the evidence was relevant to the jury's assessment of the witness' credibility; and that any prejudice is outweighed by the probative value. 3RP 19-22, 28. The trial court is generally the proper court to weigh the relevance of evidence. Foxhoven, 161 Wn.2d at 176. It is not an abuse of discretion when the trial court correctly interprets the rules of evidence. Gresham, 173 Wn.2d at 422; Foxhoven, 161 Wn.2d at 174.

The trial court did not abuse its discretion in admitting the challenged evidence for the purpose of the jury's assessment of the witness' credibility and to prove the identity and involvement of

Ballou in the charged crime. The probative value of the evidence outweighed any prejudicial effect.

2. An ER 404(b) Limiting Instruction Was Not Requested.

If a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury on the purpose and use of ER 404(b) evidence. State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012); State v. Asaeli, 150 Wn. App. 543, 577 n. 35, 208 P.3d 1136 (2009). In the present case, defendants did not request a limiting instruction, nor do they argue that the trial court erred by failing to give a limiting instruction. The trial court is not required to give an ER 404(b) limiting instruction in the absence of a request for one. State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604, 607 (2011). Failure to give an ER 404(b) limiting instruction is reviewed under harmless error. Gresham, 173 Wn.2d at 425. The error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, 173 Wn.2d at 425, citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Errors on rulings concerning admission of evidence under ER 404(b) are not of constitutional magnitude and do not result in

automatic reversal. State v. Mezquia, 129 Wn. App. 118, 131, 118 P.3d 378, review denied, 163 Wn.2d 1046, 187 P.3d 751 (2005). "Instead, if an error is found, the reviewing court must then determine, within reasonable probability, whether the outcome of the trial would have been different but for the error." Id., citing State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). A review of the entire record shows convincingly that the outcome of the trial would not have been affected had the challenged evidence been excluded or if a limiting instruction been given prohibiting the jury from considering the evidence of the prior act for the purpose of showing defendant's character and action in conformity with that character.

It is improbable that eliminating Jorgensen's statement or giving a limiting instruction would have changed the outcome of the trial. Pegs and Ballou told Zamudio that they were going to Toys R Us. 3RP 353-354. Jorgensen and Blaine observed Ballou in Toys R Us. 3RP 86, 91-92, 98-99, 106-111, 113, 145, 150, 174, 186, 194, 293-302, 318-321, 335-336. Jorgensen, Blaine and Officer Gann observed Ballou on the video surveillance recording. 3RP 113-117, 120-122, 186, 195, 223-224, 271, 302-303, 308-309, 314, 338-339. Officer Gann observed Ballou when he stopped the

Jaguar. 3RP 218-219, 250. Jorgensen was transported to the location of the stop and identified Ballou. 3RP 124-125, 186, 220-222, 250. Taken together, this evidence establishes that there is no reasonable probability that the outcome would have been materially affected by the elimination of Jorgensen's statement that he met Ballou in the past or by instructing the jury to not consider the statement for the impermissible purpose of showing defendant's character and action in conformity with that character.

E. THE JURY INSTRUCTIONS AS A WHOLE CORRECTLY STATED THE APPLICABLE LAW.

Pegs and Ballou argue that the trial court erred in failing to instruct the jury that "property means anything of value." Appellant's Brief (Pegs) at 33-36; Appellant's Brief (Ballou) at 18-22.

Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Defendants were charged with 2nd degree burglary and correctly instructed on the elements of that offense. CP 40, 43. An instruction that relieves the State of its burden to prove every element of a crime requires

automatic reversal. Brown, 147 Wn.2d at 339, citing State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997) and State v. Byrd, 125 Wn.2d 707, 713–714, 887 P.2d 396 (1995). A constitutional error is harmless only if we are convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

However, not every omission or misstatement in a jury instruction relieves the State of its burden. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Smith, 131 Wn.2d at 264 (citations omitted). Whether jury instructions as a whole correctly state the applicable law is a question of law that we review de novo. Pirtle, 127 Wn.2d at 656. Before addressing whether an instruction fairly allowed the parties to argue the case, the court must first determine whether the instructions accurately stated the law without misleading the jury. Linehan, 147 Wn.2d at 643. Jury instructions must be relevant to the evidence presented. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

Pegs and Ballou argue that the trial court erred in not instructing the jury on the definition of property in WPIC 2.21: "Property means anything of value." The Note on Use of WPIC 2.21 states: "Use this instruction only when the term 'property' may not be understood as applied to the facts of a particular case." The jury was instructed that a necessary element of the crime of 2nd degree burglary the "intent to commit the crime of theft." CP40, 43. Further, the jury was instructed: "Theft means to take wrongfully the property or another with intent to deprive the owner of such property." CP 44. A common definition of property is "something owned or possessed." Merriam-Webster Dictionary at http://www.merriam-webster.com/dictionary/property. As applied to the facts of the present case the term "property" was easily understood. The court's instructions were sufficient without defining property as anything of value. The jury instructions, taken in their entirety, correctly informed the jury of the applicable law and fairly allowed the parties to argue the case.

F. PARENTING SENTENCING ALTERNATIVE.

Pegs argues that the trial court abused its discretion in not sentencing him under the Parenting Sentencing Alternative (PSA), RCW 9.94A.655. Appellant's Brief (Pegs) at 36-38. As noted by

the trial court the PSA has only been available since 2010, and sentencing under PSA has been extraordinarily rare. 4RP 33. There is no case law on this statute.

Both PSA and Drug Offender Sentencing Alternative (DOSA) require the sentencing court to determine that 1) the offender is eligible for the alternative and 2) that the alternative sentence is appropriate. RCW 9.94A.655(4) and RCW 9.94A.660(3). Therefore, as Pegs suggests, cases regarding DOSA sentences are instructive. See Appellant's Brief (Pegs) at 36.

A criminal defendant may not appeal a trial court's decision to impose a standard-range sentence instead of the DOSA under RCW 9.94A.660. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005); State v. Jones, 171 Wn. App. 52, 55, 286 P.3d 83 (2012). Nevertheless, "every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Jones, 171 Wn. App. at 55, quoting Grayson, 154 Wn.2d at 342. "[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence ... is effectively a failure to exercise discretion and is subject to reversal." Grayson, 154 Wn.2d at 342. Such is not the case here.

Contrary to Pegs' contention, the trial court here did not refuse to consider Pegs for a PSA for untenable reasons. On the contrary, the record shows that the trial court considered several factors in deciding whether to grant Pegs' request for a PSA: Pegs' criminal history,[4] whether Pegs would benefit from PSA, and whether a PSA would serve Pegs, his family or the community. 4RP 6-24. The trial court found that Pegs was eligible, but did not find the alternative was appropriate. The court declined to impose a PSA. 4RP 33–34. The trial court did not refuse to consider Pegs for a PSA. The trial court did not abuse its discretion. Jones, 171 Wn. App. at 55.

IV. CONCLUSION

For the reasons stated above the defendants' convictions should be affirmed.

Respectfully submitted on March 20, 2013.

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[4] Unlike the DOSA statute, RCW 9.94A.660, the PSA statute specifically states: "The court shall consider the offender's criminal history when determining if the alternative is appropriate." RCW 9.94A.655(4).