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STATE OF WASHINGTON
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DEPUTY

NO. 36116-7-II
Clark County No. 05-1-01681-7

STATE OF WASHINGTON,

Respondent,

vs.

JERALD ANTHONY HANSEN

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

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LAW.**

C. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Attorney General of Washington charged Jerald Anthony Hansen by Second Amended Information with one count of Theft in the First Degree (Count I); sixty seven counts of Theft in the Second Degree (Counts 2-68); and one count of Money Laundering (Count 69). CP 63-105. The dates of offense ranged from 2002 to December 21, 2004. CP 63-105. The Attorney General also alleged in the Information that Mr. Hansen committed a series of offenses which constituted a major economic offense. CP 63. Mr. Hansen was convicted after a jury trial of each count, and the jury answered “yes” to the special verdict question on each of counts 1 through 68. CP 158-170. Mr. Hansen was given an exceptional sentence of 68 months on Count I, and exceptional sentences of 60 months on Counts 2-68. CP 171-186. This timely appeal followed. CP 201.

II. FACTUAL HISTORY

The Appellant, Jerald Anthony Hansen, was a mortgage broker between 2000 and 2004. RP Vol. XI-A, p. 684. The State, in bringing these theft allegations, theorized that Mr. Hansen charged some of his clients to set up a mortgage acceleration program they did not want and failed to deliver the program, and that he charged other clients who wanted the mortgage acceleration program the fee for setting it up but did not deliver the program. RP Vol. X, p. 622-646. Only fourteen of the sixty-eight alleged victims testified at trial. RP Vols IX-X.

Regarding the fifty-two victims who did not testify, the State relied upon documentary evidence showing that Mr. Hansen requested, on his “broker demand” letter to the escrow agent, a fee designated “MPAP” (Mortgage Payment Acceleration Program) typically in the amount of \$600; closing papers showing the MPAP fee in the closing costs; and canceled checks showing that Mr. Hansen received the MPAP fee and deposited the money into a bank account for Hansen Enterprises. Exhibits 1-1 through 68-202, 203.

The State introduced these exhibits and a summary of their meaning through the testimony of Jennifer Walton, the escrow agent for Fidelity National Title who handled each of the transactions at issue in this case. RP Vol. 8-B, p. 222. Her business is located in Vancouver,

Washington. RP Vol. 8-B. Ms. Walton testified that after preparing the settlement documents she would send them to Mr. Hansen for his review. RP Vol. 8-B, p. 227. Ms. Walton was asked by the State to prepare a flow chart which summarized all of the State's evidence as to each alleged victim. RP Vol. 8-B, p. 227-28. Exhibits 1-1 through 68-202, as well as 203 were admitted into evidence. RP Vol. 8-B, p. 229.

Ms. Walton testified that in each of the sixty-eight transactions at issue in this case, she distributed a monetary amount by check to Hansen Enterprises for an MPAP fee (as well as a loan packaging fee, typically in the amount of \$200, which was not included in the amounts charged by the State in these theft allegations), as well as the regular broker fee she distributed to Country Home Finance. RP Vol. 8-B, p. 243-327. She did this, according to her testimony, based upon instructions she received in the broker demand submitted by Mr. Hansen. RP Vol. 8-B, p. 243-327. In the case of Sheryl Perrie (Count I), there were three total loans processed and she was charged the MPAP on each of the three loans. RP Vol. 8-B, 243. According to Ms. Walton, Mr. Hansen never called her to inquire about the checks he received for Hansen Enterprises, nor did he ever return any of the checks. RP Vol. 8-B, p. 311.

John Kane, the president of Mortgage Reduction System Equity Corp testified about the service provided by his company. RP Vol. 8-A, p.

113. The service, or program provided by his company is known as the mortgage payment acceleration program, or “MPAP.” RP Vol. 8-A, p. 113. Equity Corp has “agents,” who become agents by purchasing an agent kit which explains how to sell the program. RP Vol. 8-A, p. 114. The kit cost \$495 during the time period at issue in this case. RP Vol. 8-A, p. 134. When an agent sets up the program for a homeowner, the homeowner must pay a fee of \$95 and submit an application form, a signature card to set up an account at Fifth Third Bank (the bank with which Equity Corp works exclusively to administer this program), a canceled check and a copy of his or her drivers license. RP Vol. 8-A, p. 114-15.

Mr. Kane testified that Equity Corp maintains a list of its registered agents in a database. RP Vol. 8-A, p. 116. Mr. Kane also claimed that Equity Corp maintains a record of all agent and customer contacts. RP Vol. 8-A, p. 117. Mr. Kane testified that according to his database, Mr. Hansen was not a registered agent but he did find contacts related to Mr. Hansen in his database. RP Vol. 8-A, p. 118. Mr. Kane did confirm that a person by the name of William Reed was a registered agent. RP Vol. 8-A, p. 119. Mr. Kane testified Equity Corp’s last known contact with Mr. Hansen was in October of 2000, but that they changed their database after that contact. RP Vol. 8-A, p. 120. He claimed that Equity Corp would

have assigned Mr. Hansen a customer number for future contacts and that if there were any future calls or contacts, it should be reflected in the database. RP Vol. 8-A, p. 120.

The Equity Corp database, according to Mr. Kane, revealed seven different customers and eight different entries for William Reed, but none for Mr. Hansen. RP Vol. 8-A, p. 122. Mr. Kane admitted that an agent with a registered number for Equity Corp can have an unlimited number of agents working for him, all of whom would use only one agent identifier number (that of the agent who purchased the kit). RP Vol. 8-A, 135. Mr. Kane also admitted that when an agent uses the number of another agent, they would have no way of knowing about that and do not care. RP Vol. 8-A, p. 135-36. The agents are free to charge whatever they want to facilitate the program, but Equity Corp recommended a fee of \$395. RP Vol. 8-A, p. 116.

Jennifer Rios acted as Mr. Hansen's loan processor. RP Vol. 8-B, p. 198-99. Ms. Rios testified that she prepared the broker demand documents for Mr. Hansen's accounts, and that if a demand included an MPAP fee that request would have come from Mr. Hansen. RP Vol. 8-B, p. 207.

Fourteen alleged victims testified, and the testimony of some of these witnesses is summarized below. The testifying alleged victims were

from Counts 2, 8, 15, 16, 17, 33, 37, 45, 50, 54, 57, 59, 66, and 67. CP 136-139, RP Vols. IX and X.

Leigh Thompson, the alleged victim from Count 37, was contacted by Country Home Finance about whether he would be interested in refinancing his home. RP Vol. IX, p. 362. Mr. Hansen came to his home in Port Orchard, Washington to talk with him about refinancing. RP Vol. IX, p. 362. Including the transaction at issue in this case, Mr. Thompson has purchased or refinanced a home three times. RP Vol. IX, p. 363. The transaction was completed in September of 2003. RP Vol. IX, p. 364. Mr. Hansen offered him the mortgage payment acceleration program and Mr. Thompson wanted the program. RP Vol. IX, p. 366. Mr. Thompson agreed to pay \$600 to Mr. Hansen for the program. RP Vol. IX, p. 366. Mr. Hansen explained to him that typically when you initiate a new loan, that loan is sold to another financial institution within the first month. RP Vol. IX, p. 370. When the first month went by and his new payment plan had not been established, he called Mr. Hansen and Mr. Hansen said he would look into it. RP Vol. IX, p. 370. After the second month went by, the program still had not been initiated. RP Vol. IX, p. 371. He then called Mr. Hansen and left him a message about it. RP Vol. IX, p. 371. When he didn't hear back from Mr. Hansen, he became wrapped up in work and his personal life and forgot about the program. RP Vol. IX, p.

371, 374. He didn't think about it again until he was contacted by the Attorney General's office. RP Vol. IX, p. 375.

Vickie Moon, the alleged victim in Count 16, testified that she was referred to Mr. Hansen by someone she trusts and that she contacted him over the phone. RP Vol. IX, p. 393. She was interested in refinancing her home. RP Vol. IX, p. 393. Her transaction took place in February of 2003. RP Vol. IX, p. 395. Mr. Hansen discussed the mortgage payment acceleration program with her and she was very interested in enrolling in the program. RP Vol. IX, p. 396-97. She could not recall if she signed an enrollment application for the MPAP at the time her loan closed. RP Vol. IX, p. 397. She assumed that the program would begin automatically after the loan closed. RP Vol. IX, p. 398. When her payments were scheduled to begin she contacted Mr. Hansen to ascertain how the program would work. RP Vol. IX, p. 400. She testified that Mr. Hansen told her that it would take some time for the program to begin. RP Vol. IX, p. 400. Although she testified this program was important to her, she further testified that "life took over and...I just didn't follow through with it." RP Vol. IX, p. 400. Ms. Moon was aware that she was paying the MPAP fee at the time of closing and paid it willingly. RP Vol. IX, p. 403-404.

Keiko Yoshitake, the alleged victim in Count 8, testified that she and her husband responded to an offer from Mr. Hansen for help in

refinancing their home. RP Vol. IX, p. 411. When asked if she received the MPAP, she initially said she didn't recall. RP Vol. IX, p. 414. She then testified that she received the program. RP Vol. IX, p. 415. She said that she and her husband signed up for the biweekly program, but she didn't recall when, and didn't remember if Mr. Hansen signed them up. RP Vol. IX, p. 416. She testified that due to her limited English, her husband typically handles complicated business decisions. RP Vol. IX, p. 418-19. She was asked: "So you let him make the decisions as far as how to proceed on the program?" She replied "Uh-huh." RP Vol. IX, p. 419. She testified that the decision to enter the program was her husband's. RP Vol. IX, p. 419. She did not recall Mr. Hansen telling her that she needed to provide a canceled check or any other information and had no idea if he told her husband that. RP Vol. IX, p. 421. She testified her husband was satisfied with making one payment per month and decided to abandon the biweekly program. RP Vol. IX, p. 422-23. The State did not call Mr. Yoshitake to testify.

On Count 8, there was a second loan on which Mrs. Yoshitake was not involved, only Mr. Yoshitake. RP Vol. IX, p. 424-25. There allegedly was a \$300 MPAP fee associated with this loan. RP Vol. IX, p. 424. The State relied upon documentary evidence for this loan, having not called Mr. Yoshitake to testify. Exhibit 8, RP Vol. IX, p. 425.

William Reed testified that he has known Mr. Hansen since he was twelve or thirteen years old. RP Vol. IX, p. 440. He also used to be a loan originator with Country Home Finance. RP Vol. IX, p. 441. Mr. Reed shared an office with Mr. Hansen and split the costs associated with having an office. RP Vol. IX, p. 442. One of the programs he and Mr. Hansen purchased was the MPAP. RP Vol. IX, p. 443. The program included software and marketing materials. RP Vol. IX, p. 443. Mr. Reed paid the \$500 fee on his credit card and Mr. Hansen reimbursed him for half of the cost. RP Vol. IX, p. 447. Mr. Reed confirmed that Mr. Hansen was free to set up accounts with Equity Corp using his (Mr. Reed's) identification number, and that Equity Corp "didn't care as long as they got their check." RP Vol. IX, p. 448. Mr. Reed never sold the program, and confirmed that if Equity Corp had a record of eight people enrolled in the program under his number that it would have been Mr. Hansen's clients, not his. RP Vol. IX, p. 449.

Walter Prall, the alleged victim in Count 50, testified that Mr. Hansen helped him refinance his home in December of 2003. RP Vol. X, p. 591. Mr. Prall was interested in the biweekly mortgage payment acceleration program. RP Vol. X, p. 594. Mr. Prall believed that he paid for the program by rolling it into his loan. RP Vol. X, p. 595. Mr. Prall testified, on direct examination, that he did not fill out an enrollment form

for the program. RP Vol. X, p. 595. He testified that he believed Mr. Hansen was going to send him a form in the mail after the loan closed but that he never received any paperwork. RP Vol. X, p. 595. However, Mr. Prall was shown exhibit 50-226 which was an application, signed by him, to Equity Corp for the MPAP. RP Vol. X, p. 603, Exhibit 50-226. The application was sent back to Mr. Hansen, however, because it did not comply with the new requirements of the so-called Patriot Act. RP Vol. X, p. 604-605. This document would seem to repudiate the testimony of John Kane, who claimed his company had no contact whatsoever with Mr. Hansen after October of 2000.

At the close of the State's evidence, Mr. Hansen moved to dismiss RP Vol. X, p. 622. The motion was denied. RP Vol. X, p. 644. Mr. Hansen testified on his behalf. He testified that the clients that Equity Corp, according to their database, attributed to Mr. Reed were his clients. RP Vol. XI-A, p. 762. Mr. Hansen set these clients up on Equity Corp's MPAP program between 2001 and 2003. RP Vol. XI-A, p. 778. Equity Corp is not the only provider of mortgage payment acceleration programs. RP Vol. XI-A, p. 687. When Mr. Hansen would meet a potential client, he would discuss with them not only their various loan options but also the mortgage payment acceleration program. RP Vol. XI-A, p. 694-95. He would review with the client the sixteen page MPAP brochure and give

them a comprehensive analysis about how much they would save doing a bi-weekly payment program, as well as other methods of saving on their loan. RP Vol. XI-A, p. 695.

Mr. Hansen testified that he instructed each of his clients for whom he had agreed to set up the MPAP that they needed to contact him once they received their first payment letter so that he could submit the paperwork to the mortgage acceleration company. RP Vol. XI-A, p. 711-12. Although the MPAP was not a lender based program, it would be a waste of time to prepare all of the paperwork only to have to turn around and change the lender designation because lenders, particularly in a refinance, would typically sell a loan within the first month after a loan closes. RP Vol. XI-A, p. 759-60.

In the case of clients who did not receive this program, but wanted it and paid Mr. Hansen a commission to set it up, Mr. Hansen testified these clients failed to follow up with him with the required information he needed to process the applications. RP Vol. XI-A, p. 748. In addition to the application for Mr. Prall returned by Equity Corp, Equity Corp also returned the application Mr. Hansen submitted for Eugene Washington. Exhibit 45-228. In the cases of Walter Prall and Eugene Washington, Mr. Hansen contacted them after Equity Corp rejected their initial MPAP

applications but they each failed to follow through with the application process. RP Vol. XI-A, p. 722-730.

The Court, in instructing the jury, gave Instruction number 10, which included a four page summary of counts 2 through 68, including the names of the persons named in each count, as well as the dates of offense for each count and the charge for each count. CP 135-139. On the first page of this summary, the columns were titled as follows: "Count," "Charge," "Name," and "Date." CP 136. On pages two through four of the summary, the columns were titled: "Count," "Charge," "Victim," and "Date." CP 137-139.

The jury returned verdicts of guilty as to each count, and returned special verdicts as to each of count 1 through 68 finding the current series of offenses was a major economic offense. CP 158-169. The court imposed an exceptional sentence of 68 months on Count 1, which had a standard range of 43-57 months; an exceptional sentence of 60 months on Counts 2 through 68, each of which had a standard range of 22-29 months; and a 12 month sentence on Count 69, which is an unranked felony. CP 176-183. Mr. Hansen requested a hearing on the amount of restitution owed, which the court denied. RP Vol. XIII, p. 890. The Court imposed restitution in the amount of \$70,600. CP 179, 197-98.

D. ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS IN COUNTS 1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 51, 52, 53, 55, 56, 58, 60, 61, 62, 63, 64 & 65, WHERE THE VICTIMS DID NOT TESTIFY AND THE STATE PRESENTED NO EVIDENCE ABOUT WHETHER MR. HANSEN UNLAWFULLY OBTAINED THEIR PROPERTY.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

In order to prove that Mr. Hansen committed theft, the State was required to prove that he obtained control over the property of another by color or aid of deception with the intent to deprive that person of such property. RCW 9A.56.020. Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows to be false or fails to correct another's impression which the actor previously has created or confirmed or promises performance which the actor does not intend to perform or knows will not be performed. RCW 9A.56.010 (5).

In the counts where the alleged victims did not testify, no evidence was presented from which a rational trier of fact could conclude, absent the improper conclusion that Mr. Hansen had a propensity to commit a theft based on the testimony of the testifying victims, that he unlawfully obtained \$600 from each alleged victim with the intent to permanently deprive them of that property. In order to conclude Mr. Hansen was guilty the jury had to assume several things: First, the jury had to assume that Equity Corp comprises the entire universe of mortgage payment acceleration programs, such that the "backdoor" evidence, as the trial court called it, from Equity Corp that none of the non-testifying alleged victims appeared in their database proved that they never received a mortgage payment acceleration program. Second, the jury had to assume

that the initials “MPAP” as they appear on the HUD documents, necessarily proves that the \$600 reflects a payment to Mr. Hansen for him to actually facilitate the mortgage payment acceleration program, as opposed to explaining it, providing his clients with a breakdown of their potential savings with the program and a comprehensive analysis and professional opinion of whether they would benefit the program. However, there was insufficient evidence in the record to support these assumptions.

Mr. Hansen was free to enter into an agreement with his clients that they would pay him a fee for the work entailed with explaining this program and rendering a professional opinion for his clients about whether the program is right for them. Absent testimony from the non-testifying alleged victims about whether they were deceived into paying Mr. Hansen \$600, a rational trier of fact could not have found Mr. Hansen guilty of these counts beyond a reasonable doubt. Further, principles of contract law apply here as well. “One who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party.” *Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 897, 28 P.3d 823 (2001). Here, because the State presented no evidence from the non-testifying alleged victims about *their understanding* of the agreement

they made with Mr. Hansen, and because the documentary evidence conclusively shows that they each knowingly paid the fee, the State failed to prove this was anything more than a bargained for exchange for services already rendered by Mr. Hansen.

II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION IN COUNT 8 WHERE THE ALLEGED VICTIM WAS UNABLE TO CONFIRM THAT SHE DID NOT RECEIVE A MORTGAGE PAYMENT ACCELERATION PROGRAM.

Keiko Yoshitake, one of two alleged victims as to Count 8 along with her husband, was confused and extremely unclear in her testimony. She testified, no less than twice, that she received a mortgage payment acceleration program. She then wavered and appeared to say that she and her husband lost interest in the program. Ultimately, she was clear that the decision of whether to enter this program would have been her husband's. It is unclear why the State did not call Mr. Yoshitake to testify when Mrs. Yoshitake was clear that he made the decisions relevant to this case and he spoke English better than she. In any event, no reasonable person could have concluded, based on this testimony, that Mr. Hansen, by color or aid of deception, deprived Mrs. Yoshitake of \$600.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTIONS IN COUNTS 45 AND 50 WHERE THE STATE FAILED TO PROVE THAT MR. HANSEN INTENDED TO DEPRIVE THE ALLEGED VICTIMS OF THEIR PROPERTY.

In the cases of Walter Prall (Count 50) and Eugene Washington (Count 45), the evidence is insufficient to show that Mr. Hansen acted with the intent to deprive them of their property. Both of these men wanted an MPAP program and knowingly paid Mr. Hansen a \$600 commission to set up the program. Mr. Hansen sent in applications to Equity Corp for each of these gentlemen, as well as a deposit slip in the case of Mr. Prall and a void check in the case of Mr. Washington. Exhibits 45-228 and 50-226. Contrary to the State's theory that Mr. Hansen never intended to provide any of his clients with an MPAP program, in these cases Mr. Prall and Mr. Washington would have actually been placed on Equity Corp's bi-weekly program had they not been forced to change their application due to the so-called Patriot Act. Why would Mr. Hansen take the time to fill out these applications, submit them for the clients to sign, and mail them to Equity Corp if he intended to steal \$600 from these clients? In order for the State's theory to make any sense as it relates to these two gentlemen, Mr. Hansen would not have done anything at all after the loan closed. The submission of these applications shows the evidence is insufficient to prove that Mr. Hansen acted with the intent to deprive them of their property.

**IV. MR. HANSEN WAS DENIED A FAIR TRIAL WHEN
THE TRIAL COURT COMMENTED ON THE EVIDENCE**

BY CALLING THE ALLEGED VICTIMS IN COUNTS 19-68
“VICTIMS” IN JURY INSTRUCTION NUMBER 10.

The trial court is prohibited from instructing juries on factual matters to be determined by the jury. Such an instruction would constitute a judicial comment on the evidence in violation of the Washington State Constitution, Article IV, Section 16. In *State v. Jackman*, 125 Wn.App. 552, 559 (2005), Division II ruled that “To Convict” instructions which contained the date of birth of the alleged victim, where the age of the victim was a factual matter to be decided by the jury, constituted an instructional error which relieved the burden of proving every essential element of the crime. The *Jackman* court further held that such an instruction constitutes a comment on the evidence in violation of article IV, section 16 of the Washington Constitution. Likewise, in *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997), the Supreme Court held that a special verdict instruction on the question of a school zone enhancement which specifically designated the educational program as a school violated article IV, section 16 of the Washington Constitution because it relieved the State of its burden of proving all the elements of the sentence enhancement statute. *Becker* at 65. Although this instruction was not objected to at trial, the error here is of constitutional magnitude and may

therefore be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, the instruction found at number 10 included a summary which referred to the people named in Counts 19-68 as “victims.” CP 137-139. It is unclear why the first page of this summary correctly stated “Name” in this identification column, while on the remaining pages it stated “Victim” in the identification column. CP 136, 137-139.

Nonetheless, use of the term “victim” is highly prejudicial and served to express to the jury the opinion, whether intentional or not, that the court believed Mr. Hansen was guilty of the conduct he was charged with.

Further, this comment on the evidence is not harmless beyond a reasonable doubt because the evidence in this case, insofar as it pertained to Ms. Yoshitake (Count 8), Mr. Prall (Count 50), Mr. Washington (Count 45) and all of the non-testifying parties, was insufficient to prove the elements of the crime of theft beyond a reasonable doubt. Particularly with regard to the non-testifying parties, where none of them appeared in court and testified that they were deceived or in any way aggrieved, calling them “victims” in the court’s instructions to the jury cannot be deemed harmless beyond a reasonable doubt.

V. MR. HANSEN’S EXCEPTIONAL SENTENCE SHOULD BE REVERSED BECAUSE HIS CONDUCT WAS COMMITTED PRIOR TO THE DECISION OF THE

UNITED STATES SUPREME COURT IN BLAKELY V. WASHINGTON AND THE IMPOSITION OF THE EXCEPTIONAL SENTENCE CONSTITUTED VIOLATED MR HANSEN' RIGHT TO EQUAL PROTECTION OF THE LAW.

Mr. Hansen was given an exceptional sentence for conduct which occurred prior to the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The Washington Supreme Court held in *State v. Pillatos* that even in cases where the conduct occurred prior to *Blakely*, a defendant could be subjected to a jury trial on the question of aggravators so long as his trial had not commenced, or he had not pled guilty, prior to April 15, 2005. *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007). Under the holding of *Pillatos*, the State was entitled to plead and submit aggravators to the jury in Mr. Hansen's case. Mr. Hansen, however, argues that the Washington Supreme Court's ruling in *Pillatos* would subject Mr. Hansen to violations of the equal protection clauses of the United States Constitution and the Washington State Constitution and in order to preserve his right to federal review of this issue, asks this Court depart from the holding in *Pillatos* and reverse his exceptional sentence.

In *Pillatos*, the Supreme Court held that even though no constitutionally permissible method existed for the imposition of an exceptional sentence for crimes committed before the Blakely fix

legislation was enacted and took effect on April 15, 2005, there nevertheless was no ex post facto prohibition on the empanelling of a jury to decide aggravating factors for crimes that were committed pre-Blakely but that had not yet proceeded to trial or been resolved by a guilty plea by April 15, 2005. *Pillatos* at 470-71. Mr. Hansen's case fits into this category.

In spite of the clear holding of *Pillatos*, Mr. Hansen urges this Court to depart from the reasoning of the *Pillatos* Court because it creates two disparate sentencing schemes for people who committed crimes prior to *Blakely*: Those who proceeded to trial or pled guilty prior to April 15, 2005 and those who proceeded to trial or pled guilty after April 15, 2005. Those who proceeded to trial or pled guilty prior to April 15, 2005 are rewarded with the impossibility that they will be subjected to an exceptional sentence. Those who were not able to get their cases resolved prior to April 15, 2005 (such as Mr. Hansen, who could not have resolved his case prior to this "triggering" date because the Attorney General had not yet filed any charges against him) are subjected to harsher treatment because they can be subjected to an exceptional sentence. There is no rational basis for rewarding the former category and punishing the latter category in this fashion.

“Under the equal protection clause of the Washington State Constitution, article 1, section 12, and the fourteenth amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment.” *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992); *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987); *State v. Gaines*, 121 Wn.App. 687, 704, 90 P.3d 1095 (2004). Most of the criminal cases dealing with equal protection challenges found by appellate counsel deal with challenges to a particular statute, to a particular sentence administered by a court, or to a particular charging decision by a prosecutor. See *State v. Coria*, 120 Wn.2d 1, 743 P.2d 240 (1987) (challenging RCW 69.50.435 pertaining to sentencing enhancements for school zones); *State v. Ayala*, 108 Wn.App. 480, 485, 31 P.3d 58 (2001) (challenging the prosecutor’s decision, with the court holding that a prosecutor has wide discretion to charge an offense so long as said decision is not based on an unjustifiable decision such as race, religion, or other arbitrary standard or classification); *State v. Talley*, 122 Wn.2d 192, 858 P.2d 217 (1993) (challenging RCW 9A.36.080 (1)); *State v. Pittman*, 59 Wn.App. 825, 801 P.2d 999 (1990) (challenging the prosecutor’s decision to charge multiple counts even though supported by the facts); and *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987)

(challenging the denial to juveniles of the right to a jury trial under RCW 13.04.021).

Mr. Hansen submits that he is not a member of a suspect or semi-suspect class and that his case should be subjected to minimal scrutiny under the rational basis test. *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983); *State v. McNeair*, 88 Wn.App. 331, 338-39, 944 P.2d 1099 (1997).

In *State v. Gaines*, 121 Wn.App. 687, 90 P.3d 1095 (2004) the defendant argued that he was denied equal protection under the Washington State Constitution and United States Constitution based on the King County prosecutor's refusal to offer him a particular plea offer. Mr. Gaines was convicted by a jury in June of 1999 of delivering a controlled substance within a school bus stop route. At the time of his offense, the sentencing statute contained a tripling provision requiring his two prior delivery convictions be scored as three each in determining his offender score. *Gaines* at 690. For reasons not germane here, Mr. Gaines' original sentence was overturned by the Court of Appeals and his case was remanded for resentencing. By the time of his resentencing hearing, the legislature had made changes to this particular statute, in a 2002 amendment, eliminating the tripling provision and reducing the seriousness level of Mr. Gaines' crime. *Gaines* at 691. In response to the

action of the legislature, the King County Prosecutor's Office adopted a policy of recommending exceptional sentences downward for defendants whose crimes were committed after the legislature enacted the 2002 amendment but before the amendment took effect (meaning offenses which occurred between April 1 and June 30, 2002). *Gaines* at 692. The King County prosecutor refused to offer to recommend to the court that Mr. Gaines be given an exceptional sentence downward because Mr. Gaines was not eligible, under their policy, for such a recommendation. *Gaines* at 692.

In responding to Mr. Gaines' challenge, the State alleged that Mr. Gaines was not similarly situated with the defendants who were offered the agreed exceptional sentence downward. *Gaines* at 704. The Court of Appeals disagreed, holding that the relevant "class" consisted of anyone convicted of a drug offense in King County while the tripling provision was in effect, whose crime was unexceptional, and who would have expected to receive a sentence calculated using the tripling provision. *Gaines* at 705.

The Court of Appeals held, however, that even though Mr. Gaines was similarly situated with the defendants who received the benefit of the prosecutor's policy, he nevertheless was not denied equal protection because the State had a rational basis to treat him differently than the other

defendants in his class: Mr. Gaines went to trial rather than plead guilty, and thereby consumed valuable state resources that the other defendants did not. *Gaines* at 705-06. The court stated “The goal of saving the State’s resources was rationally related to the means employed in the prosecutor’s policy—a stipulation to a reduced sentence recommendation in exchange for a pretrial guilty plea.” *Gaines* at 706.

Here, there is no such rational basis on which Mr. Hansen should be treated differently than anyone else who committed a pre-*Blakely* crime. The two-tiered system created by the *Pillatos* decision allows for defendants who also consumed state resources by exercising their right to a jury trial to receive no greater than a standard range sentence while Mr. Hansen, based upon the State’s failure to charge his case so that it might be resolved before the magic date of April 15, 2005 received an exceptional sentence. Mr. Hansen is entitled to be treated the same as others with whom he is similarly situated and his exceptional sentence should be reversed and he should be resentenced within the standard range.

E. CONCLUSION

Mr. Hansen’s convictions in the Counts identified above should be reversed because there is insufficient evidence to sustain them.

Alternatively and/or additionally, Mr. Hansen should be awarded a new

trial. Mr. Hansen's exceptional sentence should be reversed and his sentence should be within the standard range.

RESPECTFULLY SUBMITTED this 17th day of December, 2007.



ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Hansen

APPENDIX

1. § 9A.56.010. Definitions

The following definitions are applicable in this chapter unless the context otherwise requires:

(1) "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument;

(2) "Appropriate lost or misdelivered property or services" means obtaining or exerting control over the property or services of another which the actor knows to have been lost or mislaid, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property;

(3) "Beverage crate" means a plastic or metal box-like container used by a manufacturer or distributor in the transportation or distribution of individually packaged beverages to retail outlets, and affixed with language stating "property of," "owned by," or other markings or words identifying ownership;

(4) "By color or aid of deception" means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services;

(5) "Deception" occurs when an actor knowingly:

(a) Creates or confirms another's false impression which the actor knows to be false;
or

(b) Fails to correct another's impression which the actor previously has created or confirmed; or

(c) Prevents another from acquiring information material to the disposition of the property involved; or

(d) Transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or

(e) Promises performance which the actor does not intend to perform or knows will not be performed.

(6) "Deprive" in addition to its common meaning means to make unauthorized use or

an unauthorized copy of records, information, data, trade secrets, or computer programs;

(7) "Merchandise pallet" means a wood or plastic carrier designed and manufactured as an item on which products can be placed before or during transport to retail outlets, manufacturers, or contractors, and affixed with language stating "property of . . .," "owned by . . .," or other markings or words identifying ownership;

(8) "Obtain control over" in addition to its common meaning, means:

(a) In relation to property, to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property; or

(b) In relation to labor or service, to secure performance thereof for the benefits of the obtainer or another;

(9) "Owner" means a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services;

(10) "Parking area" means a parking lot or other property provided by retailers for use by a customer for parking an automobile or other vehicle;

(11) "Receive" includes, but is not limited to, acquiring title, possession, control, or a security interest, or any other interest in the property;

(12) "Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water;

(13) "Shopping cart" means a basket mounted on wheels or similar container generally used in a retail establishment by a customer for the purpose of transporting goods of any kind;

(14) "Stolen" means obtained by theft, robbery, or extortion;

(15) "Subscription television service" means cable or encrypted video and related audio and data services intended for viewing on a home television by authorized members of the public only, who have agreed to pay a fee for the service. Subscription services include but are not limited to those video services presently delivered by coaxial cable, fiber optic cable, terrestrial microwave, television broadcast, and satellite transmission;

(16) "Telecommunication device" means (a) any type of instrument, device, machine, or equipment that is capable of transmitting or receiving telephonic or electronic communications; or (b) any part of such an instrument, device, machine, or equipment, or

any computer circuit, computer chip, electronic mechanism, or other component, that is capable of facilitating the transmission or reception of telephonic or electronic communications;

(17) "Telecommunication service" includes any service other than subscription television service provided for a charge or compensation to facilitate the transmission, transfer, or reception of a telephonic communication or an electronic communication;

(18) *Value*.

(a) "Value" means the market value of the property or services at the time and in the approximate area of the criminal act.

(b) Whether or not they have been issued or delivered, written instruments, except those having a readily ascertained market value, shall be evaluated as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied;

(ii) The value of a ticket or equivalent instrument which evidences a right to receive transportation, entertainment, or other service shall be deemed the price stated thereon, if any; and if no price is stated thereon, the value shall be deemed the price of such ticket or equivalent instrument which the issuer charged the general public;

(iii) The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(c) Except as provided in RCW 9A.56.340(4) and 9A.56.350(4), whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

For purposes of this subsection, "criminal episode" means a series of thefts committed by the same person from one or more mercantile establishments on three or more occasions within a five-day period.

(d) Whenever any person is charged with possessing stolen property and such person has unlawfully in his possession at the same time the stolen property of more than one person, then the stolen property possessed may be aggregated in one count and the sum of the value of all said stolen property shall be the value considered in determining the

degree of theft involved. Thefts committed by the same person in different counties that have been aggregated in one county may be prosecuted in any county in which one of the thefts occurred.

(e) Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars;

(19) "Wrongfully obtains" or "exerts unauthorized control" means:

(a) To take the property or services of another;

(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or

(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

2. § 9A.56.020. Theft -- Definition, defense

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

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

STATE OF WASHINGTON,)
) Court of Appeals No. 36116-7-II
) Clark County No. 05-1-01681-7
 Respondent,)
) AFFIDAVIT OF MAILING
 vs.)
)
 JERALD A. HANSEN,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 17th day of December
2007, affiant placed a properly stamped envelope in the mails of the United States

addressed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Anne M. Cruser
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Mr. Jerald A. Hansen
DOC #304680
Cedar Creek Corrections Center
P.O. Box 37
Littlerock, WA 98556-0037

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (To Mr. Hansen)
- (3) DESIGNATION OF EXHIBITS (To court and counsel)
- (4) AFFIDAVIT OF MAILING

AND

Charlene Huffman
Clark County Superior Court Clerk's Office
P.O. Box 5000
Vancouver, WA 98666-5000

and that said envelope contained the following:

- (1) DESIGNATION OF EXHIBITS
- (2) AFFIDAVIT OF MAILING

Dated this 17th day of December 2007,


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: December 17th, 2007, Kalama, Washington

Signature: Anne M. Cruser