

FILED
COURT OF APPEALS
DIVISION II

00 MAY 15 PM 12:10

STATE OF WASHINGTON
BY W NO. 36116-7
DEPUTY

RECEIVED
COURT OF APPEALS
DIVISION ONE

MAY 14 2008

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JERALD HANSEN,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

SCOTT A. MARLOW
Assistant Attorney General
WSBA #25987
800 5th Avenue, Suite 2000
Seattle, WA 98104
206-389-2098

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 14 PM 2:55

80-14-5 W
PM 5-14-08

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	Issues Pertaining to Appellant’s Assignments of Error	2
1.	Should the defendant’s convictions for multiple counts of theft in the second degree be affirmed where the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty?	2
2.	Should the defendant’s convictions for multiple counts of theft in the second degree be affirmed where a typographical error on a jury instruction did not amount to a comment on the evidence, and was harmless beyond a reasonable doubt?	2
3.	Should the defendant’s exceptional sentence be affirmed when the trial and sentencing comported with established Washington State Supreme Court precedence?	2
4.	Should the defendant’s convictions for theft in the first degree, multiple counts of theft in the second degree and money laundering be affirmed when the defendant in his Statement of Additional Grounds for Review makes generalized claims of ineffective assistance of counsel without citation to neither authority nor argument to support those claims?	3
II.	STATEMENT OF THE CASE.....	3
A.	Procedural History	3
B.	Factual History.....	4
III.	ARGUMENT	5

A.	The Defendant’s Multiple Convictions For Theft Must Be Affirmed Because The Evidence Was Sufficient For A Rational Trier Of Fact To Conclude That The Defendant Was Guilty Of Those Offenses.....	5
B.	The Defendant’s Multiple Convictions For Theft In The Second Degree Must Be Affirmed When The Use Of The Word “Victim” On A Jury Instruction Was Inadvertent, Not A Comment On The Evidence, And Harmless Beyond A Reasonable Doubt.....	7
C.	The Defendant’s Exceptional Sentence Should Be Upheld When The Procedures Followed In Imposing The Sentence Comport With Constitutional Requirements And Those Procedures Have Been Held Appropriate By The Washington State Supreme Court In <i>Pillatos</i>	9
D.	The Defendant’s Convictions Must Be Upheld In The Face Of Generalized, Unsupported By Citation to Neither Authority Nor Argument, Claims of Ineffective Assistance of Trial Counsel, And A Blanket Assertion That The Activity Leading To His Criminal Convictions Should Have Been Handled As A Civil Rather Than A Criminal Matter.....	10
IV.	CONCLUSION	11

TABLE OF AUTHORITIES

Cases

Hizey v. Carpenter,
119 Wn.2d 251, 830 P.2d 646 (1992)..... 8

State v. Bencivenga,
137 Wn.2d 703, 974 P.2d 832 (1999)..... 5, 6

State v. Cox,
109 Wash.App. 937, 38 P.3d 371 (2002)..... 10

State v. Finch,
137 Wn.2d 792, 975 P.2d 967 (1999)..... 5

State v. Lord,
117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856
(1992)..... 8

State v. Pillatos,
150 P.3d 1130 (2007)..... 9

Statutes

RCW 9A.56.020(1)(b) 6

Rules

RAP 10.10(c) 10

RAP 10.10(f)..... 10

Treatises

1 Clifford S. Fishman,
Jones on Evidence: Civil and Criminal
§ 5.17 at 450 (7th ed. 1992))..... 6

Other Authorities

LAWS of 2005,
Ch. 68, § 4(1), (2) 9

I. INTRODUCTION

The defendant, Jerald Anthony Hansen, was convicted by jury verdict in February, 2007 of sixty-nine criminal charges. The convictions included multiple counts of theft (one count of Theft in the First Degree and sixty-seven counts of Theft in the Second Degree) and one count of Money Laundering. The charges arose from the defendant's activity as a mortgage broker from 2000 to 2004.

An investigation of the defendant's activities as a mortgage broker revealed that the defendant charged many clients for a mortgage payment acceleration program (MPAP). In theory, the MPAP provided an avenue to pay down the mortgage on an accelerated schedule and thereby save substantial sums of money in interest over the course of the loan. The defendant usually charged a \$600.00 fee to set-up the MPAP. The defendant charged for this service on a large number of loans, but did not provide the MPAP; in other cases, the person getting the loan declined the MPAP, but the defendant charged them the fee anyway.

A mortgage broker's fees are paid at the time of closing the home loan. The fees due to the mortgage broker are set forth in a "broker demand letter" that the mortgage broker sends to the escrow agent, who in turn adds those fees to the closing costs on the loan. Once the loan closes, the escrow agent sends the mortgage broker a check for the fees set forth

in the broker demand letter. The charges the defendant was found guilty of involve his having demanded payment of the MPAP fee, that demand being paid from the closing costs of the loan, and the defendant not having provided the MPAP service.

The defendant received fees for the MPAP in the charged counts, but failed to provide the service. The president of the company that oversaw the MPAP confirmed that none of the victims in the charged counts received the MPAP for which they were charged.

A. Issues Pertaining to Appellant's Assignments of Error

- 1. Should the defendant's convictions for multiple counts of theft in the second degree be affirmed where the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty?**
- 2. Should the defendant's convictions for multiple counts of theft in the second degree be affirmed where a typographical error on a jury instruction did not amount to a comment on the evidence, and was harmless beyond a reasonable doubt?**
- 3. Should the defendant's exceptional sentence be affirmed when the trial and sentencing comported with established Washington State Supreme Court precedence?**

////

////

////

4. **Should the defendant's convictions for theft in the first degree, multiple counts of theft in the second degree and money laundering be affirmed when the defendant in his Statement of Additional Grounds for Review makes generalized claims of ineffective assistance of counsel without citation to neither authority nor argument to support those claims?**

II. STATEMENT OF THE CASE

A. Procedural History

The defendant was charged with a total of 69 criminal offenses via a Second Amended Information filed by the Attorney General of Washington on July 21, 2006. CP 63-106. The charges included one count of Theft in the First Degree (Count 1), sixty seven counts of Theft in the Second Degree (Counts 2 thru 68) and one count of Money Laundering (Count 69). The Second Amended Information also included notice that the Attorney General of Washington would seek a sentence above the standard range for these offenses based upon the aggravating factor that this series of offenses constituted a major economic offense. CP 63-106. The defendant was convicted of all the charges following a jury trial, and the jury further found that the offenses did constitute a major economic offense. CP 158-170. The defendant received an exceptional sentence of 68 months. CP 171-186. A timely appeal followed. CP 201.

B. Factual History

The criminal charges arose from the defendant's work as a mortgage broker in Washington State. The defendant closed a number of loans between 2000 and 2004, acting as the mortgage broker. RP Vol. XI-A, p. 684. The defendant charged his customers for a program referred to as a mortgage payment acceleration program (MPAP). Exhibit 203, RP Vol. 8-B, p. 227-325. The charge for the program was usually \$600.00. *Id.* This charge was levied against the victims by a "broker demand letter" submitted to the escrow agent by the defendant. RP Vol. 8-B, p. 224-228. As a result of the defendant's demand letter, the MPAP charge was included in the closing costs of the victim's loans. Exhibit 203, RP Vol. 8-B, p. 227-325. The defendant would then be paid the MPAP fee. The State presented canceled checks showing that the defendant received the MPAP fees he demanded. Exhibits 1-1 thru 68-202, 203. The State presented the testimony of Mr. John Kane, the president of the company that administered the MPAP program that the defendant was purporting to sell. Mr. Kane confirmed that none of the victims named in the Second Amended Information had been enrolled in the MPAP program by the defendant. Exhibit 207, RP Vol. 8-A, p. 122-25.

Further factual history will be set forth as required in the argument that follows.

III. ARGUMENT

A. **The Defendant's Multiple Convictions For Theft Must Be Affirmed Because The Evidence Was Sufficient For A Rational Trier Of Fact To Conclude That The Defendant Was Guilty Of Those Offenses.**

When reviewing the sufficiency of the evidence, the role of the appellate court is to determine whether or not any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in favor of the state and against the defendant. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). So long as a rational trier of fact could find from the evidence that the defendant is guilty beyond a reasonable doubt, a conviction may be based upon direct evidence, circumstantial evidence, or a combination of the two. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). If the evidence and the inferences reasonably made there from are strong enough to permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt, a conviction may be properly based upon "pyramiding

inferences.” *Id.* (citing 1 Clifford S. Fishman, Jones on Evidence: Civil and Criminal § 5.17 at 450 (7th ed. 1992)).

A charge of theft as presented in this case requires that the State prove beyond a reasonable doubt that the defendant obtained control over the property of another by color or aid of deception with the intent to deprive the person of such property. RCW 9A.56.020(1)(b). Here the defendant claims that no evidence existed from which a rational trier of fact could conclude that in the counts in which the victim did not testify the defendant obtained property from those victims and that he intended to deprive those victims of that property. This claim is without merit.

The State presented evidence in the form of testimony from Jennifer Walton who was the escrow agent in each of the charged theft offenses. RP Vol. 8-B, p. 222. Ms. Walton testified that in each of the charged theft offenses she received a broker demand letter from the defendant. RP Vol. 8-B, p. 224-228. This demand letter instructed her to include in the closing costs for each of the loans an MPAP fee. Exhibit 203, RP Vol. 8-B, p. 227-325. In each of the loans, this fee was charged to and collected from the victim and then paid over to the defendant. *Id.*, Exhibit 204 (a stipulation entered at RP Vol. 8-A, p. 108-09). These fees were charged for the purported purpose of setting up an MPAP for the victims. *Id.* The State presented the testimony of Mr. John Kane, the

president of Mortgage Reduction System Equity Corporation, the company that administered the MPAP program. RP Vol. 8-A, p. 113-150. Mr. Kane confirmed that none of the victims – those who testified and those who did not – received the MPAP program. Exhibit 207, RP Vol. 8-A, p. 122-25.

The defendant issued a demand for fees to set-up MPAPs for the theft victims. RP Vol. 8-B, p. 227-325, Exhibit 203. The defendant received those fees as demanded, cashed the checks and kept the money. Id. The defendant did not set up the MPAPs. Exhibit 207, RP Vol. 8-A, p. 122-25. Drawing all inferences in favor of the State, it is clear that a rational trier of fact could conclude that the defendant by his demand obtained the property of another by color or aid of deception and that he did so with the intent to deprive that person of that property. The defendant's claims to the contrary must fail.

B. The Defendant's Multiple Convictions For Theft In The Second Degree Must Be Affirmed When The Use Of The Word "Victim" On A Jury Instruction Was Inadvertent, Not A Comment On The Evidence, And Harmless Beyond A Reasonable Doubt.

The defendant claims that the trial court commented on the evidence in making its instructions to the jury. This claim is based upon the apparently inadvertent inclusion of the word "victim" as a column heading on pages two and three of jury instruction 10. Page one of that

instruction had the column title “name.” CP 137-139. Based upon a review of the instructions it is clear that the use of the column heading “victim” on the subsequent pages of the summary chart was inadvertent, and clearly not a comment on the evidence.

To constitute a comment on the evidence, the court’s attitude towards the merits of the cause must be reasonably inferable from the nature or manner of the judge’s statement. *State v. Lord*, 117 Wn.2d 829, 863, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Viewed in the context of the instruction itself, it is clear that the use of the word “victim” in the column title on the subsequent pages of the summary chart was an oversight not a comment on the evidence. Such an oversight does not express the judge’s attitude toward the merits of the case.

Further, juries are presumed to obey the instructions of the court, and so even if the inadvertent inclusion of the word “victim” were found to be a comment on the evidence the inclusion of an instruction to disregard such apparent comments would remedy any error. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). In this case the jury was charged in instruction number 1 that they disregard any apparent comment on the evidence they believe that the judge might have made. CP 35. This prophylactic instruction combined with the clearly inadvertent nature of the claimed violation renders any error harmless.

C. The Defendant's Exceptional Sentence Should Be Upheld When The Procedures Followed In Imposing The Sentence Comport With Constitutional Requirements And Those Procedures Have Been Held Appropriate By The Washington State Supreme Court In *Pillatos*.

The State provided notice of its intent to seek an exceptional sentence in the Amended Information filed in this case. CP 63 - 106. The State then presented facts to a jury in support of that allegation. The jury unanimously found by special interrogatory that the aggravating factors were proven beyond a reasonable doubt. CP 159 – 166. These procedures comport with the statutory scheme set forth in LAWS of 2005, Ch. 68, § 4(1), (2), and approved by the Washington Supreme Court in *State v. Pillatos*, 150 P.3d 1130 (2007).

The defendant acknowledges that this case is governed by the *Pillatos* opinion. Brief of Appellant at 26. Despite the “clear holding of *Pillatos*, [the defendant] urges this Court to depart from the reasoning of the *Pillatos* Court” *Id.* The defendant submits this claim for the purported purpose of preserving a federal claim of violation of the equal protection clause. Brief of Appellant at 25. Such claim having been preserved, the State requests that this court follow the binding precedent of the Washington State Supreme Court’s decision in *Pillatos* rejecting the defendant’s invitation to ignore the same.

D. The Defendant's Convictions Must Be Upheld In The Face Of Generalized, Unsupported By Citation to Neither Authority Nor Argument, Claims of Ineffective Assistance of Trial Counsel, And A Blanket Assertion That The Activity Leading To His Criminal Convictions Should Have Been Handled As A Civil Rather Than A Criminal Matter.

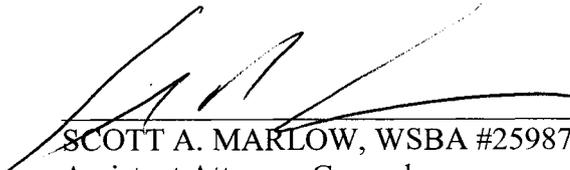
The defendant in his Statement of Additional Grounds for Review makes several generalized assertions that his trial counsel was ineffective, as well as a claim that this case should have been handled in a civil proceeding as opposed to a criminal proceeding. Under RAP 10.10(c), the defendant is not held to the same standards as appellate counsel with regard to requirements of citation to authority, reference to the record nor cogent argument. *See State v. Cox*, 109 Wash.App. 937, 38 P.3d 371 (2002). RAP 10.10(f) provides, however, that the appellate court may request additional briefing on any issues raised in the Statement of Additional Grounds for Review should it deem that necessary. The State respectfully submits that given the status and condition of the arguments submitted by the defendant in his Statement of Additional Grounds for Review, efficient and cogent response is not possible absent additional development of those arguments. While many of the claims appear to be addressed in the Brief of Appellant, should this Court deem it necessary to develop any of those claims further, the State requests that additional briefing be requested on those matters.

IV. CONCLUSION

The evidence was sufficient to support the jury's verdicts of guilty. The inclusion of the word "victim" in a portion of a jury instruction was not a comment on the evidence, and was rendered harmless by other instructions. The defendant's exceptional sentence should be affirmed as the trial court followed established legal precedence in the imposition of the sentence. Defendant's convictions and sentence must be affirmed.

RESPECTFULLY SUBMITTED this 14th day of May, 2008.

ROBERT M. MCKENNA
Attorney General



SCOTT A. MARLOW, WSBA #25987
Assistant Attorney General
Attorneys for State of Washington

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by

03 MAY 15 PM 12:10
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY W
DEPUTY

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of May, 2008, at Seattle, WA.



DAISY JACOBSON
Legal Assistant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 14 PM 2:55