

NO. 37533-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

HARRY FLEMING,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
00122300 PM 3:26
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01096-1

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether records used by Quality Rentals were properly admitted business records when the store manager testified to his familiarity with the records and their use in the ordinary course of business?

2. Whether there was sufficient evidence of guilt beyond a reasonable doubt when there was evidence offered that the defendant leased property, failed to pay for or return the property, and avoided all contact with the lessor?

3. Whether an intent to deprive jury instruction was properly given when there was evidence that the defendant failed to return the property after a demand letter was sent to his correct address via certified mail?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Harry Fleming was charged by information in Kitsap County Superior Court with Theft of Rental, Leased, or Lease-Purchased Property. CP 1. Fleming went to trial on February 21, 2008 and was found guilty by jury. CP 77.

B. FACTS

Harry Fleming signed a rental lease for an entertainment center (the “wall unit”) number 8000 with Quality Rentals on May 17, 2006. Exhibit 3.

On May 30, 2006, he returned to Quality Rentals and signed a lease for a sectional couch, number 7200. Exhibit 4. Quality Rentals is a rent-to-own furniture company in Bremerton, Washington. RP 48-49.

Quality Rentals store manager Todd Caspary testified that two order forms were filled out before the leases were signed. Ex. 1, 2; RP 50-54. The first order form listed Harry Fleming and Clarice Palmiera and included their address, phone number, and a photocopy of their photographic identification. RP 51. The second form listed only Harry Fleming's name and updated the address to 4320 Victory Drive, Port Orchard, Washington, 98367. RP 54-55, 145. Mr. Fleming testified that he filled out the order forms and accurately updated his address and phone number. RP 144-145, 148.

Both lease agreements list the lessee as Harry Fleming and include his address, phone number, and the terms of the rental agreement. RP 55-56, 59, Ex. 3,4. On both documents, his initials appear on page one and his signature on page two. RP 56, 59. The lease agreement signed May 17 states the monthly payment was \$106.43 with the first payment due May 26, 2006. RP 56. The agreement for the couch signed May 30 was for \$213.94 per month with first payment due May 31, 2006. RP 56, 59. Both leases include written notice that moving furniture without Quality Rental's permission is prohibited and that failure to return the leased property on demand may subject the renter to criminal prosecution. RP 57, 60. Mr. Fleming testified

that he read and signed both leases. RP 145, 148.

Mr. Fleming paid \$10 for each item in order to take the furniture home. RP 91-93. Mr. Caspary testified that no further payments had been made as of July 5, 2006. RP 94. He further testified that as of that date, the two items had not been returned to Quality Rentals. RP 97. Mr. Caspary stated the total replacement value of both items was \$1,446. RP 95, Ex. 11.

Mr. Caspary testified that, beginning May 27, 2006, Quality Rentals employees began calling Mr. Fleming but never made contact, either because there was no answer or there was a hang up. RP 79-82, Ex. 5. On June 7, 2006, Quality Rentals personally delivered a "6 to 15 day letter for agreement" collection notice to Mr. Fleming's residence. RP 82. The employee received no answer at the residence so left the letter and a door tag bearing Harry Fleming's name on the door. RP 82. Final notices were also left at Mr. Fleming's residence by Quality Rentals on June 12, June 21, June 22, and June 28, 2006. RP 83-84.

On June 8, 2006 two return demand letters were processed informing Mr. Fleming he was past due on both items and demanding return of the property. RP 82, 84. The letters provided the due date, the amount due, that the account was past due, and that the renter could be criminally prosecuted for failing to pay or return the property. RP 85-88. Those letters were sent

certified mail to Harry Fleming at the 4320 Victory Drive address. RP 85, 87. They were returned to Quality Rentals after two failed delivery attempts by the Post Office with the stamp "unclaimed." RP 88-89, Ex. 8.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING QUALITY RENTALS' RECORDS WHEN THE CUSTODIAN OF RECORDS LAID THEIR FOUNDATION AS BUSINESS RECORDS.

Fleming argues that exhibits two¹ through eleven were improperly admitted under the business records exception to the hearsay rule. Specifically, Fleming argues that the testifying custodian of records, Todd Caspary, was not properly qualified, that the records were not reliable because they were possibly inaccurate due to error or fraud, or that the records were inadmissible because Mr. Caspary did not personally prepare the records. Fleming's arguments, however, are without merit because the records were properly admitted as business records.

The admissibility of evidence is within the discretion of the trial court,

¹ Despite his claim to the contrary, Fleming did not object to admission of Exhibit two on the record. See RP 55. On appeal, issues not raised during trial should generally not be considered. *State v. Wiley*, 26 Wn. App. 422, 613 P.2d 549 (1980). A failure to object to the admission or exclusion of evidence at trial constitutes a waiver of the right to raise that objection on appeal. *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Fleming's claims with respect to Exhibit two, therefore, were not properly preserved and should not be considered by this Court.

and a reviewing court will reverse only when the trial court abuses its discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001); *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). The trial court abuses its discretion only if no reasonable person would have taken the same view. *Atsbeha*, 142 Wn.2d at 913-14; *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980). In addition, the ruling of the trial judge in admitting or excluding record as evidence is to be given much weight and will not be reversed unless there is manifest abuse of discretion. *State v. Kreck*, 86 Wn.2d 112, 120, 542 P.2d 782 (1975) citing *De Young v. Campbell*, 51 Wn.2d 11, 315 P.2d 629 (1957). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982) (reversed on other grounds, 99 Wn.2d 538 (1983)). Furthermore, if any evidence is admitted in error, that error is deemed harmless if other evidence established the same facts. *In re Disciplinary Proceeding Against Kronenberg*, 155 Wn.2d 184, 194 117 P.3d 1134, (2005) citing *Feldmiller v. Olson*, 75 Wn.2d 322, 325, 450 P.2d 816 (1969).

Under Washington Law, records of a regularly conducted activity are an exception to the general hearsay rule. ER 803(a)(6). This exception is codified in RCW 5.45.020:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was

made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Records kept in the ordinary course of business are presumed reliable.

State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990), citing *State v. Rutherford*, 66 Wn.2d 851, 853, 405 P.2d 719 (1965).² Under the business record statute, the trial court must be persuaded that the sources of information, and the method and time of preparation of the record were such as to justify its admission. *State v. Iverson*, 126 Wn. App. 329, 108 P.3d 799 (Div. 1, 2005), *State v. Quincy*, 122 Wn. App. 395, 95 P.3d 353, (2004) *review denied* 153 Wn.2d 1028 (2004).

1. ***The trial court did not abuse its discretion in admitting exhibits two through twelve because the a custodian of the records provided the proper foundation for the admission of the business records.***

In the present case, Mr. Caspary (a manager from Quality Rentals) provided the proper foundation for the admission of the exhibits as business records. Mr. Caspary testified he had worked for Quality Rentals for sixteen years, he was currently the store manager, and was the manager between May and July of 2006. RP 49. Mr. Caspary also described how Quality Rentals conducted its' business from the initiation of a customer contact, through the

² In addition, Admission of business records pursuant to the business records exception does not violate a defendant's right to confrontation. *State v. Monson*, 113 Wash.2d 833, 841-43, 784 P.2d 485 (1989), discussing *State v. Kreck*, 86 Wash.2d 112, 542 P.2d 782 (1975).

ordering process, to collection procedures. RP 10-15. He was also familiar with all of the forms entered into evidence and how they were created. RP 10-20, 49-60, 84-88, 100.

2. *A custodian of record may authenticate evidence under the business records exception even if the custodian did not personally prepare the documents.*

Fleming argues that Mr. Caspary was not a qualified witness to testify to Quality Rentals' records because he was not the individual who had created the specific documents. It is well settled, however, that the record need not be identified by the same person who made it; the testimony of a custodian or supervisor is generally sufficient. *State v. Iverson*, 126 Wn. App. 329, 337, 108 P.3d 799 (Div. 1, 2005) citing *Cantrill v. American Mail Line*, 42 Wn.2d 590, 257 P.2d 179 (1953). Similarly, testimony by a person who has custody of the record as a regular part of his or her work or who has supervision of its creation is sufficient even without the additional testimony of the one who actually made the record. *State v. Iverson*, 126 Wn. App. 329, 108 P.3d 799 (Div. 1, 2005); *United States v. Hutson*, 821 F.2d 1015 (5th Cir.1987)(holding computer print-out did not need to be authenticated by the same person who entered the data into the computer). Likewise, a supervisor may authenticate such a record even if they are unfamiliar with the actual contents of the record. *Morrison v. Nelson*, 38 Wn.2d 649, 231 P.2d 335 (1951).

In a case similar to the present case, the Court of Appeals upheld the admission of bank records when the foundation was laid by a person who did not prepare the records. *State v. Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (Div. 1, 1983). In *State v. Ben-Neth*, the bank's operations officer and customer service supervisor authenticated bank records despite the fact neither bank official had created or supervised the creation of the computer records, understood how the records were assembled at the computer center, or had ever been to the computer center. *Ben-Neth*, 34 Wn. App. 600. The bank officials, however, were familiar with the record keeping procedure and were able to describe the method of retrieving the records from the computer system. *Ben-Neth*, 34 Wn. App. 600.

In the present case, Fleming specifically argues that Mr. Caspary did not prepare, and the trial court should not have admitted: Exhibit number 2 (the updated order form); Exhibit number 3 (the lease purchase agreement dated 5/17/2006); and Exhibit number 4 (the lease purchase agreement dated 5/30/2006).

Mr. Caspary, however, testified that he was familiar with the order forms, trained his employees on their use, and described how the order forms were used in the business. RP 49-54. Mr. Caspary also testified that he was familiar with the leases used by Quality Rentals and that they are used in the regular course of business. RP 55, 58. Mr. Caspary was able to describe how

Quality Rentals conducts its' business from the initiation of a customer contact, through the ordering process, to collection procedures. RP 10-15. He was familiar with all of the forms entered into evidence and how they were created. RP 10-20, 49-60, 84-88, 100.

Given this testimony, Mr. Caspary as supervising manager was a properly qualified custodian of records and the records were properly admitted without the additional testimony of each person who either prepared a document or made computer entries. The trial court, therefore, did not abuse its discretion in allowing the exhibits as business records.

3. *The admission of Exhibit Eleven did not violate the confrontation clause.*

Fleming further argues in relationship only to Exhibit number eleven (the quote sheet), that its admission violated his Sixth Amendment right to confrontation. Specifically, Fleming claims that because Tammie Hale generated the report at the request of the prosecutor's office but did not testify, the document was testimonial and inadmissible under *State v. Crawford*. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The only argument raised at trial was an objection that the report lacked sufficient indicia of reliability under the business records statute. RP 35, 97-99.

The admission of a hearsay statement in violation of the

Confrontation Clause is subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 160 P.3d 640 (2007). Errors may not be raised the first time on appeal unless they involve manifest error affecting a constitutional right. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982, 984 (2007). The rule excepting constitutional errors is not meant to be a wholesale pass to allow new trials anytime a constitutional issue is not raised below. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982, 984 (2007).

The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” The confrontation clauses in the state and federal constitutions provide identical protection. *State v. Florczak*, 76 Wn. App. 55, 71, 882 P.2d 199, 208 (1994). The holding of *Crawford v. Washington* established that non-testimonial hearsay statements are inadmissible unless the witness was unavailable and the defendant had the opportunity to cross-examine them beforehand. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). However, the Court also noted that business records are generally non-testimonial statements. *State v. Kirkpatrick*, 160 Wn.2d 873, 876 (2007) citing *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354 (2004 (Rehnquist, C.J., concurring)). The Court discussed that:

[The Confrontation Clause] applies to "witnesses" against the accused--in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or

affirmation made for the purpose of establishing or proving some fact."

Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354 (2004).

The courts have held that under Washington's business records statute there is "no requirement that the person who prepared the record be shown to be unavailable before the record can be admitted." *State v. Benefiel*, 131 Wn. App. 651, 656, 128 P.3d 1251 (Div. 3, 2006), citing *State v. Kreck*, 86 Wn.2d 112, 119, 542 P.2d 782 (1975). Regarding business records, the Court in *Kreck* reasoned that the persons involved in the "routine activity" which gives rise to the document's admissibility are "unlikely to recall the details of the transaction or event in question." *State v. Kreck*, 86 Wn.2d 112, 120, 542 P.2d 782 (1975). Therefore, the court found cross examination would be of little value in insuring the reliability of the document. *State v. Benefiel*, 131 Wn. App. 651, 656, 128 P.3d 1251 (Div. 3, 2006), see also *United States v. Norton*, 867 F.2d 1354 (11th Cir.), cert. denied, 491 U.S. 907 (1989) (noting business records exception is firmly rooted in jurisprudence).

Similarly, testimony is not required to admit Department of Licensing (DOL) summaries of license status in Driving While License Suspended or Revoked cases despite their being prepared for the purpose of prosecution. *State v. Kirkpatrick*, 160 Wn.2d 873, 876 (2007)(explaining that the first layer of analysis is whether the statement is hearsay or falls under an

exception or exclusion and the second layer is whether it is testimonial and requires a showing of unavailability using a *Crawford* analysis), *State v. Konich*, 160 Wn.2d 893, 901 (2007). Washington courts have held the intent of the confrontation clause was not furthered by requiring testimony of a witness who simply “communicated [the defendant’s] driving status as indicated by DOL’s computer” and “contain[ed] neither expressions of opinion nor conclusions requiring the exercise of discretion.” *State v. Chapman*, 98 Wn. App. 888, 892, 991 P.2d 126 (2000); *State v. Konich*, 160 Wn.2d 893, 901 (2007), *State v. Smith*, 122 Wn. App. 699, 94 P.3d 1014 (2004), *rev'd on other grounds*, 155 Wn.2d 496 (2005).

Likewise in the instant case, requiring the employee who prepared the quote sheet from the store computer two years prior to trial would not further the purpose of the Confrontation Clause. The trial court found that the quote sheet was not hearsay because it was excused under the business records exception. RP 100. The quote sheet contained no opinion or analysis, merely a recitation of what Quality Rentals computer records indicated was the replacement value for the two items of furniture. RP 98. Fleming had the opportunity to confront Mr. Caspary, whom the trial court judged to be a properly qualified witness. He testified the information came from Quality Rentals’ inventory price list and was part of the business records. RP100. Mr. Caspary testified that in his personal opinion the values appeared

accurate. RP 95. The trial court found the quote sheet was a business record and that any further argument about its reliability would go to weight not admissibility. RP 100. Assuming arguendo that this issue is properly before the court, despite the lack of objection in the lower court, the records were properly admitted.

4. *Business records are presumed reliable when made in the ordinary course of business and any challenge to accuracy goes to weight not admissibility.*

Flemin further argues that the admitted records were not sufficiently reliable because they were capable of containing errors and were susceptible to employee fraud. Such possibilities, however, are not grounds for denying admission of the evidence; rather, actual evidence of error or fraud would go to the jury to determine what weight if any to ascribe to the evidence.

The business records exception statute includes a presumption of reliability where the records are kept in the regular course of business. RCW 5.45.020; *State v. Rutherford*, 66 Wn.2d 851, 853, 405 P.2d 719 (1965) *cert. denied* 384 U.S. 267 (1996). Implicit in it is the presumption that an employee will do his duty. *State v. Rutherford*, 66 Wn.2d 851, 853, 405 P.2d 719 (1965) *cert. denied* 384 U.S. 267 (1996). Regarding the reliability of the specific documents, Division One explained in a footnote that:

Whether business records are stored in a computer or in a traditional fashion the likelihood of and nature of possible error are the same. These include arithmetic error, incorrect posting of

charges, credits, or debits, entry of information onto the wrong account, and numerous other potential mistakes caused by human fallibility or by mechanical or electronic failure. Given the complexity of modern institutions one cannot expect routine record-keeping to be completely error-free. Where actual error is suspected the challenge should be to the accuracy of the business record, not to its admissibility.

State v. Ben-Neth, 34 Wn. App. 600, 663 P.2d 156 (Div. 1, 1983).

Fleming argues that some of the exhibits contain inconsistencies that should have rendered them inadmissible, requiring the conviction be reversed.³ He also argues the former employee of Quality Rentals who compiled many of the documents, Tammie Hale, was terminated for reasons that cast doubt on the accuracy of the admitted records. Fleming claims merely that the possibility of fraud existed. However, even if he had evidence of actual fraud in these records, it is an issue properly for the jury to decide. The trial court admitted the documents as business records despite Fleming's challenges. RP 33, 98. The judge stated that any challenges to their veracity or completeness went to the weight of the evidence not its admissibility. RP 33. The jury heard the defense arguments and were not persuaded. The State laid a proper foundation that all the documents were used in the ordinary course of business and the court did not abuse its discretion in admitting the

³ For instance, the defendant claims certain exhibits are rendered inadmissible by his following arguments regarding their reliability: Exhibit number four includes handwritten interlineations; Exhibit five is incomplete because, as explained by Mr. Caspary, the printed view is not large enough to include the entire computer field; Exhibit number six lists a due date different than that on the lease; Exhibit eight, the demand letter, was not written on the same date it was mailed; and Exhibits eight and nine, the payment histories, were not referenced in the customer contact notes. All of these arguments are classic examples of issues that go to the weight not the admissibility of

records.

B. THE JURY HAD SUFFICIENT AND SUBSTANTIAL EVIDENCE TO FIND EACH ELEMENT PROVED BEYOND A REASONABLE DOUBT WHEN THE EVIDENCE SHOWED THE DEFENDANT LEASED PROPERTY, FAILED TO PAY FOR OR RETURN THE PROPERTY, AND AVOIDED ANY FURTHER CONTACT WITH THE LESSOR.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010(1969). The appellate court is not free to weigh the evidence and decide whether it leans in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010(1969). A reviewing court should defer to the trier of fact on any issues of conflicting testimony, witness credibility, and evidence persuasiveness. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (Div 3, 1992).

In reviewing the sufficiency of the evidence, an appellate court examines whether a rational trier of fact could find that the essential elements

the evidence.

of the charged crime have been proven beyond a reasonable doubt. *State v. Benciyenga*, 137 Wn.2d 703,706,974 P.2d 832 (1999); *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385 (1980). Under this standard, the reviewing court must draw all reasonable inferences in favor of the State. *State v. Smith*, 104 Wn.2d 497,507, 707 P.2d 1306 (1985), *State v. Salinas*, 119 Wn.2d 192, 201, (1992). When no direct evidence is presented regarding a material element of the crime, a reviewing court must look to whether there is adequate circumstantial evidence from which a trier of fact could reasonably determine that the element is proven. *State v. Bailey*, 52 Wn. App. 42, 51, 757 P.2d 541 (Div.2, 1988), affirmed 114 Wn.2d 340 (1990). To determine whether sufficient proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (Div.2, 2000), review denied, 141 Wn.2d 1023 (2000).

Washington's Theft of Rental, Leased or Lease-Purchased Property statute includes an intent element.⁴ The evidence, viewed in a light most

⁴ RCW 9A.56.096 provides: "(1) A person who, with intent to deprive the owner or owner's agent, wrongfully obtains, or exerts unauthorized control over, or by color or aid of deception gains control of personal property that is rented, leased, or loaned by written agreement to the person, is

favorable to the State, showed that the defendant, with intent to deprive, obtained or exerted unauthorized control over the property of another valued between \$250 and \$1,500 in the State of Washington. RP 70. The only element Fleming claims falls short of the burden is the intent to deprive element. There was, however, substantial evidence such that any rational juror could have found the intent to deprive element proved.

The trier of fact had evidence that Fleming was the sole lease holder responsible for payments, had made no payments after obtaining the property, had not returned the property, and had avoided all Quality Rentals' attempts to contact him. Though innocent explanations for Fleming's behavior may have existed, the trier of fact has ultimate discretion and could reasonably infer Fleming acted intentionally.

Fleming was the only person named on the leases, making him solely responsible for making payments. RP 55-57, Ex. 3-4. There was testimony that he personally went to Quality Rentals four times. RP 51. Fleming updated his address with Quality Rentals and testified the address and phone number Quality Rentals used was accurate. RP 54-55, 145. Further, it was shown that, other than the \$20 he paid at the store in order to take the furniture away, no payments had ever been made. RP 91-94, Ex. 9-10. No

guilty of theft of rental, leased, lease-purchased, or loaned property.”

evidence was presented that Fleming had paid anything either directly or through another person, including his wife. RP 149.

The State produced consciousness of guilt evidence that suggested Mr. Fleming was purposefully evading Quality Rentals attempts to collect payment. Fleming received written notice that any failure to pay would subject him to prosecution. RP 147, Ex. 3-4. Despite this, Fleming had no contact of any kind with Quality Rentals after claiming the furniture. RP 96-97. There was evidence that Quality Rentals called Fleming's home on over twenty occasions to demand payment. RP 79-83, Ex. 5. On some occasions the Quality Rentals employee was unable to leave a voice message because the voicemail box was full. RP 81, 83. On one occasion, an employee called Fleming's home and the person who answered hung up on the employee. RP 79-80, Ex. 5. While it is possible this was simply a mistake, reviewing the evidence strongly in favor of the State, the reasonable conclusion is that Fleming hung up on Quality Rentals, refused to answer his phone, and blocked his voicemail in order to dodge his creditors. There was testimony that on five separate occasions employees went to Fleming's home, knocked on the door, and, having received no answer, left door cards demanding payment. RP 84, Exhibit 5. Quality Rentals sent a demand letter to Fleming by certified mail but after two attempts to deliver it, it was returned unclaimed. RP 88-89, Ex. 8. All of this evidence is probative of Fleming's

consciousness of guilt and supports an inference he acted intentionally.

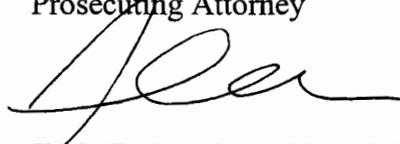
The trier of fact had evidence that Fleming was the lessee, that Quality rentals had his correct contact information, that he made no payments after obtaining the furniture, and that he successfully evaded all of the company's attempts to contact him. This evidence is sufficient to allow the jury to find beyond a reasonable doubt that Fleming intentionally deprived Quality Rentals of its property.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GIVING AN INTENT TO DEPRIVE JURY INSTRUCTION WHEN THE EVIDENCE SHOWED THE DEFENDANT FAILED TO RETURN OR PAY FOR THE PROPERTY AFTER A DEMAND LETTER WAS SENT TO HIS CORRECT ADDRESS VIA CERTIFIED MAIL.

Fleming next claims that the intent to deprive instruction is predicated on proof a defendant actually received in hand notice of a final demand. This claim is without merit because the RCW 9A.56.096 defines receipt of proper notice as the mailing of a certified letter and does not require actual receipt.

Those jury instructions that are properly examined on appeal are to be reviewed to determine whether they accurately state the law without misleading the jury. *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256

Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'Jenna', written over the printed name.

JENNINE E. CHRISTENSEN

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