

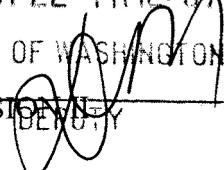
FILED
COURT OF APPEALS
DIVISION II

ORIGINAL

08 OCT 22 PM 12:07

No. 37692-0-II

STATE OF WASHINGTON

BY 
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KODI CARR,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable S. Brooke Taylor, Judge
Cause No. 07-1-00055-0

BRIEF OF RESPONDENT

CAROL L. CASE
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 17052

TABLE OF CONTENTS

A. APPELLANT’S ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 2

E. CONCLUSION..... 13

TABLE OF AUTHORITIES

Federal Cases

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)1, 2	
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).....	2
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1970).....	12
<i>Strickland v. Washington</i> , 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	5

Washington Cases

<i>In re Personal Restraint of Benn</i> , 134 Wn.2d 868, 888, 952 P.2d 116 (1998).....	6
<i>State v. Adams</i> , 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).....	7
<i>State v. Ager</i> , 128 Wn.2d 85, 86, 904 P.2d 715 (1995).....	9
<i>State v. Bennett</i> , 87 Wn. App. 73, 77, 940 P.2d 299 (1997).....	5, 6
<i>State v. Blair</i> , 117 Wn.2d 479, 491, 816 P.2d 718 (1991).....	12
<i>State v. Burden</i> , 104 Wn.App. 507, 512, 17 P.3d 1211 (2001).....	3
<i>State v. Contreras</i> , 57 Wn.App. 471, 473. 788 P.2d 1114.....	12
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	11
<i>State v. Guloy</i> , 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), <i>cert denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed. 2d 321 (1986).....	12
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996;	5, 6

State v. Johnson, 90 Wn.App. 54, 74, 950 P.2d 981 (1998)..... 11

State v. Johnson, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980)..... 6, 7

State v. Jones, 71 Wn.App. 798, 812 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994)..... 12

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992)..... 5

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)..... 5, 6

State v. Perrett, 86 Wn.App. 312, 322, 936 P.2d 426 (1997)..... 11

State v. Rainey. 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002) 7

State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) 5, 6

State v. Traweek, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied* 106 Wn.2d 1007 (1986) 12

State v. Wittenbarger, 124 Wn.2d 467, 475. 880 P. 2d 517 (1994)..... 2, 3

Rules

RAP 10.3(b)..... 2

A. APPELLANT'S ASSIGNMENTS OF ERROR

1. Defendant claims the State failed to provide discovery materials under *Brady v. Maryland*.¹
2. Defendant claims ineffective assistance of counsel because of a failure to see dismissal of the charge based on the State's failure to preserve material exculpatory evidence.
3. Defendant claims ineffective assistance of counsel for failure to request a jury instruction on the defense of a good faith claim of title to the property allegedly stolen.
4. Defendant claims cumulative error denied her a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State's failure to produce a recording of an inmate telephone call showing that defendant's use of the complainant's ATM card was lawful. Assignment of Error No. 1.
2. Whether failure to seek dismissal based on the State's failure to preserve material exculpatory evidence of the inmate telephone amounted to ineffective assistance of counsel. Assignment of Error No. 2.
3. Whether trial counsel's failure to request a jury instruction of a good faith claim of title to the property stolen amounted to ineffective assistance of counsel. Assignment of Error No. 3.
4. Whether the cumulative error doctrine applies in the instant case. Assignment of Error No. 4.

¹ 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State generally agrees defendant's recitation of the procedural and substantive facts set forth in her opening brief at pages 2 through 8 with the following cautionary note: defendant's opening brief is replete with incorrect cites to the Report of Proceedings.

D. ARGUMENT²

1. THE STATE PRODUCED ALL **BRADY** MATERIAL THAT WAS AVAILABLE AND/OR EXCULPATORY.

The State agrees that it must turn over exculpatory evidence, whether or not requested by the defense, where the evidence is material either to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The prosecution has a duty to disclose material exculpatory evidence and a related duty to preserve such evidence for use by the defense. *State v. Wittenbarger*, 124 Wn.2d 467, 475. 880 P. 2d 517 (1994); *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). "In order to be considered material exculpatory evidence, the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant

² RP1 cites to the Report of Proceedings dated March 24, 2008
RP2 cites to the Report of Proceedings dated March 25, 2008
RP3 cites to the Report of Proceedings dated March 26, 2008
RP4 cites to the Report of Proceedings dated April 24, 2008

would be unable to obtain comparable evidence by other reasonably available means.” *Wittenbarger*, 124 Wn.2d at 475 (citing *Trombetta*, 467 U.S. at 489.) The standard of review for trial court determinations that evidence is or is not material and exculpatory is de novo. *State v. Burden*, 104 Wn.App. 507, 512, 17 P.3d 1211 (2001).

Defendant complains that the jail failed to preserve one or more calls between her and Mr. Topham. The first call defendant complains of not being preserved related to Mr. Topham’s dog. Defendant testified that the call relating to Topham’s dog was made right after he got arrested, some two to three weeks before the preserved calls. RP2, 50. Topham was arrested on September 28, 2006. RP1, 28. Topham’s phone call about his dog falls outside the time period of the four recorded and completed calls to the defendant. Because that phone call about the dog was not exculpatory or even relevant, the State was not required to turn it over. However, defense counsel listened to that phone call in the prosecutor’s office prior to trial.

Defendant complains that a second call made by Topham to her was not preserved. According to the defendant that second call related to Topham telling her she could use Mr. Wheeler’s ATM card to make

purchases and Topham would reimburse Mr. Wheeler for those purchases. RP2, 51-52, 114-123.

Officer Wenzl explained the procedure for how calls are recorded from the jail and that all calls, except attorney calls are recorded. RP1, 39-40. Officer Wenzl further explained the process by which those completed calls can be retrieved and how the jail can tell whether or not the call was completed. RP1, 41-42. The second call defendant complains of not being preserved is a figment of her imagination; if it had been completed, it would have been recorded, retrieved and provided to defense counsel. The defendant alleges the unrecorded second call was exculpatory and material to her defense.

The four phone calls that were preserved were made by Topham to the defendant between October 26, 2006 at midnight and November 2, 2006 at 11:50 p.m. RP1, 41. Topham was released from the jail on October 29, 2006 at 11:05 a.m. RP1, 28. There were only four completed phone calls recorded from Topham to the defendant from the time of his arrest to the time of his release. RP1, 42. Defendant's claim that there were two exculpatory calls that were not preserved is without merit.

2. DEFENDANT’S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE FOR DISMISSAL BASED ON HER ALLEGATIONS THAT THE STATE FAILED TO PRESERVE MATERIAL EXCULPATORY EVIDENCE.

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Additionally, the criminal defendant must show there exists a reasonable probability that, but for defense counsel’s deficient conduct, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940

P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Because trial strategies and techniques may vary among lawyers, a defense attorney's decision that constitutes a trial tactic or strategy will not support a claim of ineffective assistance of counsel. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 888, 952 P.2d 116 (1998); *Johnson*, 92 Wn.2d at 682; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the

wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978)

Finally, if the evidence supports a finding beyond a reasonable doubt that the defendant was guilty as charged, it cannot be asserted that his counsel was incompetent simply because the defendant was not acquitted. *Johnson*, 92 Wn.2d at 682.

In alleging ineffective assistance of counsel, the defendant bears the burden of showing there were no legitimate strategic or tactical reasons behind defense counsel's decision. *State v. Rainey*. 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002).

Defendant argues that the second call she claims was not preserved is material and exculpatory because it would have proved her "assertion

that her use of Wheeler's ATM card for expenses was perfectly proper and pursuant to arrangements between her, Mr. Topham, and Wheeler.”

Defendant's Opening Brief at page 13. To the contrary, there were never any arrangements between the defendant, Mr. Topham and Mr. Wheeler. Mr. Wheeler had an arrangement with Topham to provide his ATM card to Mr. Wheeler's designee to bail Mr. Wheeler out, not Mr. Topham. The defendant never bailed Mr. Wheeler out. RP1 16-20. The defendant contends that she was using Mr. Wheeler's card in good faith and that she had permission to use the card. Defendant's Opening Brief at page 13. This assertion is not supported by the evidence.

Transcripts of the four completed calls from Topham to the defendant were provided to the jury during deliberations. (Exhibit A attached). It is obvious from the recorded conversation at pages 5 of 23 through 8 of 23 that neither Topham nor Wheeler knew the balance in Mr. Wheeler's account. Under those circumstances it would be impossible for any conversation between the defendant and Topham discussing the defendant using that ATM card to be paid the money Topham allegedly owed her and Topham reimbursing Wheeler. Furthermore, at page 19 of 23, the defendant and Topham discuss the fact that Wheeler has money in his account and Topham is “pulling that money out so we could eat and you know, do some partying” That second unrecorded conversation that

the defendant alleges is a figment of the her imagination. Her claim is without merit.

Defendant further claims that “the outcome of trial would have been different but for counsel’s deficient performance in failing to seek dismissal” for the State’s failure to preserve a conversation between Topham and her and “the presence of the call as evidence in the case would have resulted in acquittal”. There is nothing in the record to indicate the court would have dismissed the case upon defendant’s motion. In addition, no one can second guess what a jury would do. Counsel was not ineffective.

3. DEFENDANT’S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A DEFENSE OF “GOOD FAITH CLAIM OF TITLE” BECAUSE DEFENDANT WAS NOT ENTITLED TO SUCH A DEFENSE.

The defendant’s mere assertion that she was entitled to the property is not sufficient to raise this defense. There must be evidence that (1) the property was taken openly and avowedly and (2) there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken, even though the claims of title may prove to be untenable. *State v. Ager*, 128 Wn.2d 85, 86, 904 P.2d 715 (1995).

In the instant case, the defendant obtained Wheeler's ATM card via Clifford Topham. She did sign for it. However, Wheeler was under the understanding that his ATM card would be used to bail him out of jail. RP1, 17. Topham apparently never passed that information on to the defendant. Topham asked the defendant to bail him out. (Exhibit A, pages 1 of 23 through 23 of 23). Furthermore, given the conversation occurring between Topham and the defendant (Exhibit A, page 19 of 23) that Topham was only "pulling that money out so we could eat and you know, do some partyin'" does not support a defense of "good faith claim of title."

According to the defendant, Topham owed her some \$4200. RP 2, 53-54. He was unable to pay that over a long period of time. Furthermore, Topham could not bail himself out of jail and conned Wheeler out of his ATM card so that the defendant could bail him out. (Exhibit A, pages 4 of 23 through 5 of 23). There is no feasible explanation that the defendant could believe that she could use Wheeler's ATM card in an unfettered manner believing that Topham would pay Wheeler back – Topham had no money.

Defendant's mere assertion that she was entitled to the property is not sufficient to raise this defense. There is no evidence that (1) the property was taken openly and avowedly, other than the ATM card, and

(2) there is no evidence that some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken. The defendant was not entitled to an instruction on “good faith claim of title”.

Defendant claims that all the evidence pointed toward good faith use of the ATM card. The only thing that the evidence pointed to was an unfettered spending spree by the defendant immediately after she obtained that card. She spent thousands of dollars without regard to keeping track that what she spent did not exceed what Topham owed her. This can hardly be called good faith. Counsel’s performance was not deficient.

4. CUMULATIVE ERROR DOCTRINE DOES NOT APPLY IN THE INSTANT CASE.

Where it appears reasonably probable that the cumulative effect of the trial errors materially affected the outcome of the trial, reversal is required. *State v. Johnson*, 90 Wn.App. 54, 74, 950 P.2d 981 (1998). An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn.App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In the instant case, there was no accumulation of errors materially affecting the outcome of the trial. The State did not fail to preserve a

recorded conversation between the defendant and Topham because the conversation did not occur. Defendant's counsel was not ineffective for failing to present a good faith claim of title, to which the defendant was not entitled. Defendant's counsel was not ineffective for failing to move the court to dismiss the case based on the State's failure to preserve a recorded conversation that never occurred. The defendant received a fair trial with competent counsel.

If this court finds error, the State asked the court to find that any error was harmless.

When error is claimed, the court typically determines if there is a substantial likelihood that any error affected the verdict. *State v. Contreras*, 57 Wn.App. 471, 473, 788 P.2d 1114 (1990) [*quoting State v. Traweek*, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied* 106 Wn.2d 1007 (1986)], *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) [*citing In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1970)]. When error affects a separate constitutional right, it is subject to the stricter standard of constitutional harmless error. *Id.* Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Jones*, 71 Wn.App. 798, 812 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994); *State v. Guloy*, 104 Wn.2d 412,

426, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed. 2d 321 (1986).

The evidence in the instant case was overwhelming that the defendant used Wheeler's ATM card to her own advantage making unfettered purchases for herself and her boyfriend. Error, if there was any, is harmless.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant's conviction.

DATED this 15th day of October, 2008 at Port Angeles,
Washington.

Respectfully submitted,



Carol L. Case, WABA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

RECEIVED

MAR 21 2008

CLALLAM COUNTY
PROSECUTING ATTORNEY

ORIGINAL

COLLECT TELEPHONE CALL FROM THE CLALLAM COUNTY JAIL
OCTOBER 26, 2006

Inmate calling from Clallam County Jail - Cliff

Woman on phone - Kodi

08 OCT 22: PM 12: 1
STATE OF WASHINGTON
BY DEPUTY

FILED
COURT OF APPEALS
DIVISION II

AUTOMATED OPERATOR: You have a collect call from

INMATE: Cliff.

AUTOMATED OPERATOR: An inmate at Clallam County

jail.

This call is from a correctional institution and is subject to monitoring and recording.

Custom calling features are not allowed during this conversation.

Charges may include \$1.50 per month bill fee depending on billing channel selected.

The cost for this call is \$2.25.

if you consent to this call being recorded and accept the charges, press 0.

Thank you for using TNETIX.

Go ahead with your call.

CLIFF: Thank you.

EXHIBIT A

KODI: Hey.

CLIFF: I've got good news and bad news.

1 Well, I'll tell you some good news.

2 KODI: What's that?

3 CLIFF: Okay.

4 KODI: That you're getting out, hopefully.

5 CLIFF: Well, you – but still a little bit of help from you.

6 KODI: Yeah?

7 CLIFF: But I've got the money thing kind of like

8 transferred around.

9 You need a pencil.

10 KODI: Uh huh. Uh huh.

11 Wait, hold on.

12 I'm painting.

13 CLIFF: Oh really? What are you painting?

14 KODI: My -- the bed – (interrupted)

15 CLIFF: Body paint?

16 KODI: No, (chuckle) no, the living room.

17 CLIFF: Oh, it's no fun to paint body paint by yourself.

18 KODI: Oh, God, let me.

19 CLIFF: Where's what's his name?

20 KODI: Uh, he's on the couch.

21 CLIFF: Oh.

22 KODI: He's doing something.

23 CLIFF: Fuck.

24 KODI: Yeah.

25

1 Okay, here we go.

2 Okey dokey.

3 Shoot.

4 CLIFF: Okay, I've got a good friend up here, okay?

5 KODI: Okay.

6 CLIFF: He's made arrangements here now.

7 Write this name down.

8 Thomas A. Wheeler.

9 KODI: (chuckle) Okay.

10 CLIFF: W-H-E-E-L-E-R.

11 KODI: E-E-L-E-R, yeah.

12 CLIFF: Got it?

13 KODI: Um hmmm.

14 CLIFF: Okay, and here's the (inaudible).

15 KODI: Is he related to Allie?

16 Is he related to Ollie?

17 CLIFF: No, he's (interrupted).

18 KODI: Okay, go ahead.

19 CLIFF: But he's authorized, he's authorized for you to get

20 his card from up here.

21 His bank card?

22 KODI: Uh huh.

23 CLIFF: Okay and here's the kill number.

24 And we just talked to them again, they said all you have to do is pick it up.

25

1 KODI: Okay.

2 CLIFF: You've got to confirm it.

3 KODI: What?

4 CLIFF: If you want to confirm that --

5 KODI: Okay.

6 CLIFF: The number up here is 417—

7 KODI: Okay.

8 CLIFF: 2458.

9 KODI: So, what do I do?

10 CLIFF: Okay, well here's his PIN number first.

11 KODI: Okay, okay.

12 CLIFF: I'll put all of these numbers down for you.

13 KODI: Okay, okay.

14 CLIFF: 1524.

15 He thinks it's 24, it might be 34.

16 KODI: Okay, well I can try.

17 CLIFF: 1524.

18 KODI: Okay.

19 CLIFF: Okay, and they've already, you know, to do all

20 this, it's all got to be documented.

21 They're kites, they call them up here but (interrupted)

22 KODI: Yeah, you gotta -- I don't try to go in there and

23 grab it.

24 CLIFF: That's all you have to do.

25

1 KODI: And then go to the bank and get the money out.
2 CLIFF: Yeah, but the deal is though, I think we've got – he
3 thinks he's only got a 500 limit.
4 KODI: Uh huh.
5 CLIFF: Part of it out tonight and part of it out at 12 a.m.,
6 you know, 12:01.
7 KODI: So you want me to come down there tonight?
8 Can I get it tonight?
9 CLIFF: Yeah, yeah.
10 KODI: Okay, but I'm not going to be able to do nothing
11 with you until tomorrow?
12 CLIFF: No, if you want to wait 'til 12:01 to get the other
13 half.
14 KODI: I'd rather just do it in the morning instead of -- that
15 looks kind of silly.
16 I know you don't want to stay there but it's late, you know, where are you
17 going to go, anyway?
18 CLIFF: That's cool but, I mean, you don't get up until 5.
19 KODI: Well, no, I know.
20 I'll be awake.
21 CLIFF: Okay, right on.
22 KODI: Okay.
23 CLIFF: And he believes there's enough to cover both of
24 (inaudible)
25

1 KODI: Uh huh.

2 CLIFF: If he gets out next week and anyway he said I
3 could just put my money (inaudible).

4 KODI: Uh huh.

5 CLIFF: Right one.

6 KODI: To him and stuff like that.

7 CLIFF: Yeah, I can take care of him but so you really don't
8 have to get involved if you don't want, you just put that on my books.

9 KODI: All the money?

10 CLIFF: Yeah, in my name.

11 KODI: Okay.

12 CLIFF: Oh no, oh fuck.

13 KODI: What?

14 Can I do this tomorrow?

15 CLIFF: Um, I owe \$40 to these guys for medication.

16 KODI: Can I do this tomorrow?

17 CLIFF: Yeah.

18 KODI: Okay, how much did he have in his account?

19 CLIFF: He's not sure.

20 KODI: Well, I'll -- I'll, okay.

21 Well, okay, well, we'll see.

22 CLIFF: But --

23 KODI: He has a thousand though, right?

24

25

1 CLIFF: Yeah, he believes that – but see, I owe \$40 for
2 medications.

3 KODI: Uh huh. I don't have any out, you know?

4 CLIFF: Yeah.

5 KODI: I don't have any money.

6 I'm totally toked.

7 CLIFF: Okay, but you just go ahead and if you get this
8 card tonight?

9 KODI: Uh huh.

10 CLIFF: Um, would you mind running that buy over and
11 putting it on the books?

12 KODI: Okay.

13 CLIFF: Well, that ought to give me his balance and
14 (inaudible).

15 KODI: Huh?

16 CLIFF: 'Cause you don't have to have to worry about the
17 other until later on.

18 KODI: Yeah.

19 CLIFF: But least I can have half.

20 KODI: Okay.

21 CLIFF: Cool.

22 KODI: Okay, yeah, that'll tell me and then I can just tell
23 them.

24 CLIFF: Don't.

25

1 They're -- they're being real assholes up here because there's some heavy
2 shit going down (interrupted)

3 KODI: Right - will they know what the balance is of what
4 he has in there?

5 CLIFF: They'll tell me my balance when it's on the books.

6 KODI: I meant his balance in his account so you'll know if
7 he doesn't have the 500.

8 CLIFF: Oh, we'll just -- why don't -- can I call you back and
9 find that out?

10 KODI: I can't do this -- why don't we do this tomorrow?
11 I'll get up early, I promise and I'll do it and then I'll be -- by noon I'll have the
12 second one.

13 CLIFF: Oh, the second one, yeah.

14 KODI: Yeah.

15 CLIFF: (inaudible)

16 KODI: (inaudible)

17 Well, you have to do it like every two hours.

18 CLIFF: No, you have -- every 24 hours?

19 KODI: Oh, I see. I see. I see.

20 Okay.

21 CLIFF: I won't call you back.

22 KODI: Okay.

23 CLIFF: But get the one tonight.

24 KODI: Okay.

1 I'll do that.

2 I'll do that.

3 CLIFF: Okay, that'd be nice.

4 KODI: Okay.

5 CLIFF: Bye.

6 KODI: Bye.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COLLECT TELEPHONE CALL FROM THE CLALLAM COUNTY JAIL
OCTOBER 27, 2006

Inmate calling from Clallam County Jail - Cliff
Woman on phone – Kodi

AUTOMATED OPERATOR: You have a collect call from:

INMATE: Cliff.

AUTOMATED OPERATOR: An inmate at Clallam County
jail.

This call is from a correctional institution and is subject to monitoring and
recording.

Custom calling features are not allowed during this conversation.

Charges may include \$1.50 per month bill fee depending on billing channel
selected.

The cost for this call is \$2.25.

if you consent to this call being recorded and accept the charges, press 0.

Thank you for using TNETIX.

Go ahead with your call.

CLIFF: Hello?

KODI: Hey.

1 CLIFF: Hey.

2 KODI: Well, it only let me take out \$400.

3 CLIFF: Yeah?

4 KODI: That – I took it out at 10:30 and I went back at

5 12:30 and it wouldn't let me take out anymore so –

6 CLIFF: Yeah, okay.

7 KODI So just give me a day and I'll have it all out for

8 you.

9 CLIFF: Right on.

10 Okay.

11 So you took out a fourth, so another fourth would be 8?

12 KODI: Uh huh.

13 CLIFF: Okay, so you don't have to go to anymore trouble.

14 If you get that little four out date, take with you – okay, Jordan will help me

15 with 200.

16 KODI: Who is?

17 CLIFF; Jordan Lee, it's (inaudible) I talk to.

18 KODI: Are you sure 'cause he's – well, he's really

19 adamant about not doing that.

20 CLIFF: Okay.

21 KODI: Because he was just helping some girl out that just

22 left with like a thousand dollars.

23 CLIFF: Well, like a thousand is a lot different than 200.

24

25

1 KODI: Well, you know, and I said anything and he was
2 like real adamant so I don't know if you really want to go there.

3 I know you really want to get out, you know.

4 CLIFF: Yeah.

5 KODI: And this guy's a friend of yours that's helping you
6 now?

7 CLIFF: Huh?

8 KODI: Is guy a friend of yours that's helping you now?

9 CLIFF: Yeah, kind of.

10 Well, yeah, he is but I got to worry about him when I get out so I'm going to
11 have to pay off my checks and –

12 KODI: Yeah.

13 CLIFF: You know.

14 KODI: Who's he?

15 CLIFF: Huh?

16 KODI: What's he in there for?

17 CLIFF: He smacked his old lady again.

18 KODI: Oh.

19 CLIFF: Yeah.

20 So, right on.

21 Well, you know what?

22 I have confidence in you that you can dig up 200 bucks even if you have to go
23 to the pawn shop.

24

25

1 KODI: Well, you know – I can, I can, I'll have it in there if
2 not tonight, it will be by tomorrow morning.

3 CLIFF: Okay, but listen (interrupted)

4 KODI: I can get it all for you.

5 CLIFF: What I need you to help me to do (interrupted)

6 KODI: What about that (inaudible) 40?

7 CLIFF: Huh?

8 KODI: What about that 40?

9 CLIFF: That's okay, I'm leave owing that but you cannot
10 put it on the books because they'll soak it up but see that way that this goes up
11 here?

12 If somebody else posts my bond?

13 KODI: Uh huh.

14 CLIFF: When they go to like, this is all over?

15 KODI: Uh huh.

16 CLIFF: They have to release it because it's not mine.

17 KODI: Okay.

18 CLIFF: So if you post it, they have to give it back to you.

19 If I post it, they don't have to give it to me.

20 KODI: Okay, so you want me to go to a bondsman?

21 CLIFF: No! Take it up here.

22 KODI: To where? To the --?

23 CLIFF: (inaudible)

24 KODI: To the -- right to where I got the thing at?

25

1 CLIFF: Yeah.

2 KODI: Okay.

3 CLIFF: It's a thousand dollars cash only.

4 KODI: Okay.

5 CLIFF: You see, the deal works that they don't have to
6 give it back to me.

7 KODI: Okay.

8 CLIFF: But they have to give it back to you or my mom or
9 whoever.

10 KODI: It's nice of this guy to trust you with his card.

11 CLIFF: Well, yeah, because when I get out, we're going to
12 go to dinner.

13 KODI: (inaudible)

14 CLIFF: (inaudible)

15 We could bring Steve back a burger or something.

16 KODI: What?

17 CLIFF: We could bring Steve back a burger or something.

18 KODI: Oh yeah.

19 CLIFF: Does he know what you're doing?

20 KODI: Yeah, so uh (interrupted)

21 CLIFF: Does he?

22 KODI: Okay, I was gonna – it, well, I'll get you out by
23 tomorrow morning, okay?

24 CLIFF: Okay, I love you, Kodi.

25

1 KODI: You will be out by then.

2 CLIFF: Right on.

3 KODI: Okay.

4 CLIFF: See ya. Bye.

5 KODI: Bye.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COLLECT TELEPHONE CALL FROM THE CLALLAM COUNTY JAIL
OCTOBER 28, 2006

Inmate calling from Clallam County Jail - Cliff
Woman on phone – Kodi

AUTOMATED OPERATOR: You have a collect call from:

INMATE: Cliff.

AUTOMATED OPERATOR: An inmate at Clallam County

jail.

This call is from a correctional institution and is subject to monitoring and recording.

Custom calling features are not allowed during this conversation.

Charges may include \$1.50 per month bill fee depending on billing channel selected.

The cost for this call is \$2.25.

if you consent to this call being recorded and accept the charges, press 0.

Thank you for using TNETIX.

Go ahead with your call.

KODI: Okay.

CLIFF: Good morning.

1 KODI: Good morning, blaaah.

2 CLIFF: Good news?

3 KODI: Yeah. I'm going to go and borrow the extra 200

4 bucks—

5 CLIFF: Okay.

6 KODI: From my mom or something.

7 They're at a funeral right now, okay?

8 CLIFF: Okay, cool.

9 KODI: So I'm just waiting for them to get home.

10 In the meantime I have to go – you guys are wearing me out.

11 (chuckle)

12 This is no fun.

13 CLIFF: I know (inaudible)

14 Do you know, call Mike first if you want.

15 Medic Mike.

16 KODI: I, I don't want to call people and ask them.

17 CLIFF; Okay. Okay.

18 KODI Because besides I feel stupid enough calling,

19 (inaudible)

20 CLIFF: I know.

21 KODI: You know, and stuff and I've got to run to

22 Harborview real quick.

23 CLIFF: Okay.

24

25

1 Harborview?

2 KODI: Yeah, 'cause -- the hospital.

3 CLIFF: What's wrong.

4 KODI: Oh, a friend of mine is in there and stuff --

5 CLIFF: Oh Jesus.

6 KODI: Yeah, I know, it's been Hell week.

7 I wish it was today.

8 CLIFF: (inaudible).

9 KODI: I thought it was Sunday today, I don't know.

10 But okay, this afternoon?

11 I will pop you out.

12 CLIFF: You know what though?

13 You could probably -- when did you get that money?

14 Yesterday?

15 KODI: No, I still don't have it all.

16 CLIFF: Oh, shit.

17 I thought he was like yesterday because he got the rest today but I thought
18 your plans were.

19 KODI: I couldn't get it out yesterday.

20 (inaudible)

21 I went yesterday, last night.

22 CLIFF: Uh huh.

23

24

25

1 KODI: And it said "you're still insufficient" what's it
2 called?

3 Not insufficient funds.

4 CLIFF: Not available?

5 KODI: Your amount due.

6 So that 20 – that 24 hour thing doesn't work.

7 CLIFF: Okay, but did you check the balance?

8 KODI: And stuff.

9 Yeah, he has money in there but it's the -- it's -- it's-- you know, they must wait
10 24 hours.

11 I've never had it so --

12 CLIFF: Oh, I see.

13 From the time you pull it out.

14 KODI: Exactly, so -- so, you know, I know, I know you
15 want out of there so bad --

16 CLIFF: Oh. You can only imagine.

17 KODI: I know. I know.

18 CLIFF: And you know, 'cause I'm only pulling that money
19 out so we could eat and you know, do some partyin'.

20 KODI: Okay well --

21 CLIFF: 'Cause I've gotta pay you, you know.

22 KODI: Yeah, Yeah.

23 CLIFF: Definitely.

24 KODI: When does he get out?

25

1 CLIFF: He doesn't know until Tuesday.
2 KODI: Oh. They'll sentence him Tuesday?
3 CLIFF: Yeah, this is like the second time and there's no
4 bail.
5 KODI: Oh, shit.
6 CLIFF: But he's got – he wants me to transfer funds for
7 him and oh, fuck.
8 KODI: Oh, he wants the money too?
9 CLIFF: Yeah, he's sure his wife is going to take the house
10 and –
11 KODI: Oh, okay, well, I will, I will, as soon as I can, Cliff,
12 okay?
13 CLIFF: Okay.
14 KODI: Okay, honey, I promise you.
15 CLIFF: Thank you. Okay.
16 KODI: Okay, good bye.

17
18
19 (end of call)
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COLLECT TELEPHONE CALL FROM THE CLALLAM COUNTY JAIL
OCTOBER 29, 2006

Inmate calling from Clallam County Jail - Cliff

Unidentified Man on phone -

AUTOMATED OPERATOR: You have a collect call from:

INMATE: Cliff.

AUTOMATED OPERATOR: An inmate at Clallam County

jail.

This call is from a correctional institution and is subject to monitoring and recording.

Custom calling features are not allowed during this conversation.

Charges may include \$1.50 per month bill fee depending on billing channel selected.

The cost for this call is \$2.25.

if you consent to this call being recorded and accept the charges, press 0.

Thank you for using TNETIX.

Go ahead with your call.

CLIFF: Good morning.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNIDENTIFIED MALE: Hey, well, you should be out in
about two minutes.

CLIFF: Love you, man.

UNIDENTIFIED MALE: All right, brother.

See ya.

CLIFF: Bye.

(end of call)

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

STATE OF WASHINGTON,
Respondent,
vs.
KODI CARR,
Appellant.

NO. 37692-0-II

AFFIDAVIT OF SERVICE BY MAIL

U

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 21 day of October, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent with Exhibit "A", addressed as follows:

MR. DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

Doreen Hamrick
Doreen Hamrick

SUBSCRIBED AND SWORN TO before me this 21st day of October, 2008

Linda J. Mayberry
(PRINTED NAME) _____

NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/30/2011

AFFIDAVIT OF SERVICE