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DIVISION II

08 NOV -3 AM 10:16

STATE OF WASHINGTON
BY JW

DEPUTY

NO. 37751-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEANETTE ANN DOCKTER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
GRAYS HARBOR COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00033-1

BRIEF OF APPELLANT

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STATE OF WASHINGTON,

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vs.

JEANETTE A. DOCKTER

Appellant.

NO. 37751-9-II

OPENING BRIEF OF APPELLANT

I. ASSIGNMENT OF ERROR

- A. Dockter's constitutional right to a jury trial was violated because her waiver was not knowingly, voluntarily and intelligently made.**
- B. The trial court erred when it admitted and considered improper evidence.**

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Did the trial court err when it proceeded to a bench trial without a jury without determining that Dockter had knowingly, voluntarily and intelligently waived her right to a jury trial when the record shows that she agreed to a trial by six jurors?**
- B. Did the trial court err when it admitted and considered a post-it note and two computer screen shots over defense objection?**

III. STATEMENT OF THE CASE

On January 18, 2008, Jeanette Dockter was charged by information filed in the Superior Court for Grays County with one count of Theft in the Second Degree in violation of RCW 9A.56.040(1)(a) and RCW 9A.56.010(18)(c). Dockter was arraigned in Superior Court on February 19, 2008. CP 6. At that time defense counsel filed a Request for Trial/Hearing Date indicating a one day jury trial. CP 13. On April 7, 2008, the parties stipulated that Dockter's statements were admissible. CP 16. On April 14, 2008, Ms. Dockter and her counsel signed a "Waiver of Trial by Jury of Twelve." CP 17. On the waiver, Ms. Dockter gave up her right to a trial by twelve jurors and agreed that her case could be tried by a jury of six jurors. CP 17. Defense Counsel signed the form acknowledging that the defendant voluntarily, knowingly and intelligently agreed to a jury trial of six jurors. CP 17. The Court signed an Order stating "Based on the above, it is ORDERED that this cause be tried before a jury of six persons." CP 17.

The following colloquy took place concerning the waiver on April 14, 2008.

Mr. Newman (DPA): I guess we're set to go to trial.

The Court: All right.

Ms. Newbry (defense counsel): I'm handing forward a waiver of jury.

Mr. Newman: I don't think there are any issues other than this case might be continued, because it's not a jury trial, to Wednesday or Thursday.

The Court: All right.

Mr. Newman: I think the defendant needs to be told to call the attorney on Monday.

The Court: Right. You should keep in contact with your attorney because if there is a log jam of jury trials, we may move that a day or two. Do you understand that?

Defendant: Yes sir.

Court: Okay. Ms. Dockter, do you read and write well?

Defendant: Yes.

Court: Did you carefully read this waiver of trial by jury?

Defendant: Yes, I did.

Court: Did you discuss it with your attorney?

Defendant: I did.

Court: Do you understand it?

Defendant: Yes.

Court: Do you clearly understand you have a right to a jury trial where 12 citizens will determine your guilt or innocence?

Defendant: Yes.

Court: That's guaranteed by both the U.S. and Washington state constitutions?

Defendant: Yes.

Court: Do you also understand with the 12 jurors, 12 have to be convinced beyond a reasonable doubt to convict you?

Defendant: Yes, I do.

Court: You understand with a bench trial, the prosecution just has to convince the judge beyond a reasonable doubt of your guilt or innocence.

Defendant: Yes.

Court: And you did sign that after you carefully read it and understood it.

Defendant: Yes, I did.

Court: I will accept your waiver. Make sure you keep in contact with your attorney, especially that Monday before just to make sure when the trial will go.

Ms. Newbry: She keeps in very good contact.

Court: And be here at 8:30 on the day of trial.

RP April 14, 2008 pages 2-4

A bench trial was held on May 7, 2008, with a different judge presiding than that of April 14, 2008. There was no discussion or questioning by the court concerning a waiver of jury trial. The Court found Dockter guilty as charged. RP 69.

IV. SUBSTANTIVE FACTS

At trial, Doug Streeter, Chief Financial Officer for Gray's Harbor PUD testified concerning an investigation involving Dockter. RP 4-45. He testified that on November 21, 2007, Dockter was closing out her cash drawer in his office and came up \$200.00 short, which prompted the investigation. RP 7. As part of the investigation a video tape of the customer service desk was reviewed. RP 8. The video tape was presented at trial. On the video the date and time displayed November 21, 2007 at 4:47 p.m. RP 10. Streeter testified that the time stamp on the video was accurate. RP 7. The video depicted Dockter taking a post-it note from underneath a mouse pad and keying something into the computer. RP 10. The video also reflected Dockter placing two \$100.00 bills in her pocket. RP 10. The Court asked the witness what the post-it note said. RP 12. Written

on the note was “Slover, 120 Eklund, \$40 by the 20th”. The note was admitted over defense objection that the note had not been seen before. RP 12. It was determined that a blank page had been provided to defense because the yellow post-it note with fluorescent orange writing did not copy. RP 14. Because defense had no other objection, the court admitted the post-it note. RP 14.

The state moved to admit Plaintiff’s exhibit 11, which was a screen shot from the computer system reflecting Slover’s account. RP 14-15. Defense objected on hearsay grounds. RP 15. The court asked the witness “Is this a business record maintained on the software program of the Gray’s Harbor PUD?” The witness replied that it was and the court admitted it. RP 15.

Streeter testified that on the Monday following the shortage, before Dockter’s shift began, she was taken into the office with several other people and confronted about the shortage. RP 16. Dockter began to cry and stated she had done something wrong and said she had taken the money. RP 16-17. She denied any other incidences and did not state how much money she had taken. RP 17. She voluntarily resigned. RP 17.

After Dockter resigned, Streeter received some complaints from customers about receiving bills when they had made payments. RP 18. Streeter provided a copy of a receipt that had been brought in by one customer, Rong Reth, which was admitted into evidence. RP 19-20. The receipt was for \$300.00 paid on November 21, 2007. A photocopy of Reth’s December statement was also admitted which showed that a payment of \$100.00 had been applied to his account on November 21, 2007. RP 20. Mr. Reth testified, however, there was a communication problem and the only thing he

testified to is that he paid his bill in November and received a notice on a bill that he was not credited with all he paid. RP 50-51. In addition another video was presented, also from November 21, 2007, showing Reth paying his bill in cash with three \$100.00 bills. RP 22. The video reflects Dockter typing into the computer when no customers are there. However, there was also a stack of mail with payments to be posted at her workstation. RP 22.

The same video showed a person making a payment on November 20, 2007. The person handed Dockter \$240.00 in cash. She returned \$20, and gave change of \$6.89. RP 35. A computer screen shot of Sarah Eddy's account was admitted over defense objection. RP 26-27. The screen print showed a payment of \$213.11 made and then later cancelled. The printout showed a payment of \$62.61 – two transactions, one on the 21st and one on the 26th, that were cancelled totaling \$150.50. RP 24. The computer screen shots did not have an employee ID on them showing who had completed the transactions. RP 35. Ms. Eddy testified that in November she was with her boyfriend when he made a payment on her account. She watched him make the payment. She did not remember how much, and she lost the receipt. RP 52. She later received a notice that her power would be disconnected. RP 53.

Streeter testified there was only one post-it note found and there were no others. RP 39. Although the video showed Dockter writing on post-it notes, there was no evidence of what was being written on those notes. RP 40. Streeter also testified that other than this one occasion on November 21st, there had not been a shortage that

warranted investigation. Generally, a shortage of \$10.00 or more warranted an investigation. RP 41-42.

Finally, Don Bradbury of the Aberdeen Police Department testified that he spoke with Dockter and at first she only admitted to taking \$200.00. After Bradbury presented her with information from Streeter's investigation, Dockter admitted to taking \$20 to \$30 amounts starting around June 2007 and returning it back into accounts prior to the statements being sent out. RP 56-57. Dockter provided a written statement which was admitted into evidence. RP 57-58.

The defense did not present any evidence. The Court found Dockter guilty.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT PROCEEDED TO A BENCH TRIAL WITHOUT FIRST CONFIRMING THAT DOCKTER HAD KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HER RIGHT TO A JURY TRIAL.

The right to a jury trial in a criminal case is constitutionally protected. U.S. Const. Amend. 6; WA Const. art. 1, sec. 21,22. A defendant may waive the right to a jury trial as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences. State v. Stegall, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994). The waiver must either be in writing, or done orally on the record. State v. Wicke, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979). A reviewing court will not presume that the defendant waived his jury trial right unless there is adequate record showing that the waiver occurred. State v. Woo Won Choi, 55 Wn. App. 895, 903, 781 P.2d 505 (1989),

superseded on other grounds as recognized by State v. Anderson, 72 Wn. App. 453, 458-59, 864 P.2d 1001 (1994) (*citing* Seattle v. Williams, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984)). In fact, in order to preserve the right to a jury trial, courts should indulge every reasonable presumption against waiver, absent an adequate record to the contrary. Williams, 101 Wn.2d at 451.

The State carries a heavy burden in demonstrating a voluntary, knowing, and intelligent waiver of any constitutional right. In re James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). Waiver is an “intentional relinquishment or abandonment of a known right.” Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 2d 1461, 58 S. Ct. 1019 (1938). The validity of a waiver of jury trial, as with waiver of any depends on the circumstances of the case, including the defendant’s experience and capabilities. Stegall, 124 Wn.2d at 725.

A reviewing court considers whether the defendant was informed of his constitutional right to a jury trial, and the facts and circumstances generally, including the defendant’s experience and capabilities. Woo Won Choi, 55 Wn. App. at 903. A written waiver, as CrR 6.1(a) requires, is not determinative, but is strong evidence that the defendant validly waived the jury trial right. Id. at 904.

An attorney’s representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. Id. Courts have not required an extended colloquy on the record. Stegall, 124 Wn.2d at 725; State v. Brand, 55 Wn. App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant. Stegall, 124 Wn.2d at 725.

Because it implicates the waiver of an important constitutional right, review is *de novo*. State v. Vasquez, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001). The validity of the waiver of the fundamental constitutional right to a trial by jury may be raised for the first time on appeal. *See Wicke*, 91 Wn.2d at 644-45.

In this case, there is a written document in the record, which states that Dockter agreed to give up her right to a trial by a jury of twelve and agreed to a trial by a jury of six. According to Woo Won Choi, the writing is ‘strong evidence’ of her waiver. The writing did not waive her right to a jury trial altogether, it only waived her right to a trial by a jury of twelve. The Court did conduct a colloquy with the defendant; however, the colloquy leads to an ambiguous understanding at best. Although the court asked her if she understood her right to a trial by twelve jurors, and also asked her if she understood what it meant with a bench trial, the court did not ask her if she was giving up her right to a jury trial and agreeing to a bench trial. Instead, the court continually referred to the document she signed. “Ms. Dockter do you read and write well; did you carefully read *this* waiver of trial by jury; did you discuss *it* with your attorney; do you understand *it*; and did you sign *that* after you carefully read *it* and understood *it*?”

The court’s colloquy centered on the document Dockter signed. Dockter signed a waiver of a jury by twelve and agreed to a jury by six. Based on this record, the state cannot meet its burden to show Dockter voluntarily, intelligently and knowingly waived her right to a trial by jury. Since the court can consider Dockter’s personal background in determining what she understood to be happening, Dockter had no prior experience with the courts. This was a first offense for her. She signed a document that said one thing,

and another thing happened. On the date of the trial before a different judge, the court did not even address the issue, when the document in the record only waived the right to a jury by twelve and agreed to a jury by six. Because this court should indulge every reasonable presumption against waiver, absent an adequate record to the contrary, it was error for the court to proceed to a bench trial without first determining that Dockter had voluntarily, intelligently and knowingly waived her right to a jury trial.

The conviction should be reversed and the case remanded for a new trial.

B. THE TRIAL COURT ERRED WHEN ADMITTED AND CONSIDERED UNRELIABLE EVIDENCE UNDER THE BUSINESS RECORD EXCEPTION WITHOUT REQUIRING THE STATE TO PROVE THAT THE EXCEPTION APPLIED.

While due process does not guarantee every person a perfect trial, Bruton v. United States, 391 U.S. 123, 20 L. Ed.2d 476, 88 S. Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. State v. Swenson, 62 Wn.2d 259, 382 P.2d 614, (1963). It also guarantees a fair trial untainted by unreliable evidence. State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999).

For example, in State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999), the prosecutor filed a motion to revoke a defendant's SOSSA sentence, based in large part on a claim that he had exposed himself to a 13-year old and 14-year old girl. During the revocation hearing, the state relied upon hearsay to establish the facts of the alleged exposure, and the state did not present any evidence as to why it

failed to call the two girls themselves. After the court granted the motion and revoked the sentence, the defendant appealed arguing in part that the trial court denied him due process when it admitted the hearsay account of the incident without presenting any evidence on the reliability of the hearsay. The Washington Supreme Court agreed, holding that the trial court had violated the defendant's due process rights when it based its decision at least in part upon unreliable evidence.

In the case at bar, the trial court admitted and considered evidence over defense objection. A post-it note allegedly written in September, two months prior to the investigation, was found and admitted into evidence on the basis that it had not been seen by defense before. The court admitted the evidence. A related document, a screen shot from the computer system that correlated to the post-it note was then offered and admitted into evidence over defense objection. When the defense objected, the court, not the state, simply asked the witness if the document was a business record maintained on the software program of the Gray's Harbor PUD, and then admitted the document when the witness simply replied, "yes". As the following explains, this evidence was inadmissible hearsay and its use denied the defendant his right to a fair trial under Washington Constitution, Article 1, section 3 and United States Constitution Fourteenth Amendment.

Under ER 802, hearsay “is not admissible except as provided by these rules, by other court rules, or by statute.” Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out of court statement made by an in court witness. State v. Sua, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the “unwillingness to countenance the general use of prior prepared statements” as substantive evidence. See Advisory Committee’s Note to Federal Rules of Evidence 801(d)(1).

In the case at bar the court admitted a post-it note and screen shots of a computer screen. Although such evidence might be generally admissible as a business record under RCW 5.45.020, the state did not present evidence to qualify it as such in the case at bar.

This hearsay exception states:

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.

RCW 5.45.020

In a recent case, a medical report was used by the prosecution although the nurse who prepared the notes was not available. State v. Hopkins, 134 Wn.App. 780, 142 P.3d

1104 (2006). The state argued that the report was admissible under the business records exception to the hearsay rule. Hopkins, 134 Wn. App. at 789. To be admissible under the business records exception, the business record must (1) be in record form; (2) be of an act, condition, or event; (3) be made in the regular course of business; (4) be made at or near the time of the fact, condition, or event; and (5) the court must be satisfied that the sources of information, method and time of preparation justify admitting the evidence. Id. (citing, RCW 5.45. 020; State v. Ziegler, 114 Wn.2d 533, 538, 789 P.2d 79 (1990)). However, the state is not excused from laying the appropriate foundation. Id.

In Hopkins, there was no testimony as to how the report was generated or that the report was produced in the regular course of business. The Court of Appeals found that it was error to admit the report. Id. at 790. Here, there was no proper foundation for any of the documents that were admitted. The state was not required in this case to lay a foundation as to the creation of the documents; whether the documents were created in the normal course of business; whether the documents could be altered; whether the documents were created at or near the time of the event. There was absolutely no foundation presented to prove that the documents were reliable. The court asked if the document was a business record maintained on the software program of the PUD – simply a conclusory question without any foundation.

A trial court's decision to admit or refuse evidence is with its discretion and will not be reversed absent a manifest abuse of discretion. State v. Kreck, 86 Wn.2d 112, 120, 542 P.2d 782 (1975). Here, because the state did not lay the proper foundation, and the court did not require it, the court abused its discretion in considering the evidence.

An evidentiary error is ground for reversal if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)(quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). An error is harmless if the evidence is of minor significance in reference to the evidence as a whole. Neal, 144 Wn.2d at 611. In this case, the error is not harmless. Dockter was charged with Theft in the Second Degree based on a series of transactions, which are part of a common scheme or plan. Without these documents, the video tape and testimony support only one transaction that resulted in a shortage of \$200.00. That transaction concerned the account of Reth on November 21, 2007, the day that Dockter's cash drawer came up short, which resulted in the investigation. Without the erroneously admitted evidence, the court would not have been able to find beyond a reasonable doubt that Dockter committed a theft of more than \$250.00 through a series of transactions, which were part of a common scheme or plan. Therefore, the error was not harmless. Reversal is required.

VI. CONCLUSION

For the forgoing reasons, the conviction should be reversed and this case remanded for a new trial.

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Respectfully submitted this 31st day of October, 2008.



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CERTIFICATE OF SERVICE

I certify that on the 31st day of October, 2008, I sent via U.S. Mail the original and one copy of the Brief of Appellant for filing to the Clerk of the Court, Court of Appeals, Div. II, 950 Broadway, Ste. 300, Tacoma WA 98402, and that I sent via U.S. Mail a true and correct copy of this Brief of Appellant to the Office of the Prosecuting Attorney, Grays Harbor County Superior Court, 102 W Broadway Ave., Rm 102, Montesano, WA 98563 and Jeanette Dockter, Appellant, 1002 West Market, Aberdeen, WA 98520.

By: April Broussard
April Broussard, Legal Assistant