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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

DEPUTY

NO. 38589-9-II

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

STATE OF WASHINGTON, Respondent

v.

RICHARD MICHAEL AMARO, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-00289-6

BRIEF OF RESPONDENT

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08-1-1111

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I. STATEMENT OF THE FACTS

State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court violated the statute of limitations as it relates to count one of the second amended information which was a series of acts connected together by a common scheme or plan (criminal impulse).

Specifically, the State filed a Second Amended Information. (CP 36). Count one of that information was a charge of Theft in the First Degree dealing with a series of acts that were connected together as a common scheme or plan running from December 1, 2002, through September 21, 2006, with the named victim, Pamela Liebel. The novel claim made by the defendant is that the trial court did not instruct the jury that a portion of the crime committed occurred within the available charging period. The claim is that the statute of limitations is three years and therefore much of this is outside of the three year statute of limitations. However, this totally flies in the face of all case law and statutory authority.

The first thing to note is that the defense offers absolutely no case law to support this position. The cases that it cites and tries to rely on do

not stand for the proposition that the defendant claims they do. For example, the defendant cites to State v. Novotna, 76 Wn. App. 343, 884 P.2d 1336 (1994) to make its argument. However, Novotna was a child sex case which dealt with some of the counts being outside of the normal statute of limitations. The jury rendered a general verdict and the Court of Appeals sent it back for retrial. However, the claim was not that this was an ongoing course of conduct (criminal impulse) but was an isolated series of acts.

No exceptions were taken to the jury instructions concerning the charging of this matter. A copy of the Court's Instructions to the Jury (CP 148) is attached hereto and by this reference incorporated herein. Further, the defense had also proposed jury instructions but none of those deal with the type of situation being referred to here. (CP 46).

The statute of limitation for theft is 3 years. RCW 9A.04.080(1)(g). When property is stolen from the same owner by a series of acts, there may be a series of crimes or a single crime, depending upon the facts and circumstances of each case. State v. Brisebois, 39 Wn. App. 156, 692 P.2d 842 (1984) (relying on State v. Vining, 2 Wn. App. 802, 808, 472 P.2d 564, 53 A.L.R.3d 390 (1970), review denied, 103 Wn.2d 1023 (1985).

§ 9A.56.010. Definitions

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

In State v. Vining, 2 Wn. App. 802, 472 P.2d 564, 53 A.L.R.3d 390 (1970), the Appellate Court approved a charge in which the State aggregated a series of petit larcenies committed over a protracted period of time so as to allege the commission of the crime of grand larceny. In Vining, 2 Wn. App. at 808-09, the Court held: “Where property is stolen from the same owner and from the same place by a series of acts there may be a series of crimes or there may be a single crime, depending upon the facts and circumstances of each case. If each taking is the result of a separate, independent criminal impulse or intent, then each is a separate crime, but, where the successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.”

A continuing crime is not completed until the criminal impulse is terminated. Consequently, the statute of limitation does not begin to run until the crime is completed. Brisebois at 163 (citing State v. Carrier, 36 Wn. App. 755, 758, 677 P.2d 768 (1984)); State v. Greathouse, 113 Wn. App. 889, 921, 56 P.3d 569 (2002).

The defendant spends a lot of time in his brief discussing State v. Mermis, 105 Wn. App. 738, 20 P.3d 1044 (2001). He appears to be trying to claim that this supports his position. However, Mermis was an auto theft case and the appellate court is quite clear that if the defendant's acts in persuading the victim to the title and bill of sale was part of a criminal impulse to steal the car by deception, prosecution for the theft by deception was not barred by the statute of limitations. The State relied on the doctrine of continuing criminal impulse to argue that the deception was not complete until Mermis terminated activities on September 26, when he used deception to persuade Johnson to sign the title and bill of sale. The argument would thus be that until the crime is complete, the statute of limitations does not begin to run. Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury. If Mermis' act in persuading Johnson to sign the title and bill of sale on September 26 was part of a criminal impulse to steal the car by deception, prosecution for theft by deception was not barred by the statute

of limitations. (Mermis, 105 Wn. App. at 745-746). This matter was remanded for retrial because the Court of Appeals could not tell based on the jury instructions what theory was being used. It does note, however, that under the theories that it sees, either finding would render prosecution timely.

The appellant tries to use this language to argue that jury instructions must ensure that the defendant is convicted only if the criminal impulse driving the plan continues into the limitation period. (Brief of Appellant, page 12). Yet, as indicated, there is no case law to support this proposition and the statute and case law support that the statute of limitations does not begin to run until the completion of the criminal impulse. Because of that, there is no error and the State submits that this contention by the defendant is without merit.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the court commented on the evidence and thus requires reversal.

The appellant cites specifically to Report of Proceedings 401 and 402 to show that the court allegedly interjected its own feelings about this matter and somehow let the jury know that the State's approach was correct and accurate.

The area in question in the transcript was a situation where the edited and unedited portions of the defendant's taped admissions were purportedly going to be utilized by the parties. The defense was trying to show a number of interruptions and the entire matter was getting out of hand. All the trial judge did was get things back on track, get the parties discussing it appropriately, and allowing the jury the opportunity to listen to the portions of the tape as the parties saw fit. The discussion was as follows:

Q. (Defense Attorney) If you just look through there, the times he's being interrupted have been highlighted. If you would take issue that he wasn't interrupted in some of those, feel free to take that issue. Otherwise, just tell me if approximately 100 interruptions is accurate when you review the transcript.

A. (Officer Hemstock) I'm not sure the number of interruptions, but it's typical that when we are interrupting somebody, often times it's more of an interrogation kind of talking banter back and forth, versus just allowing a person generally just to speak uninterrupted.

Q. Okay. So are you electing not to determine how many times he was interrupted?

A. I wouldn't know from looking at the transcript how many times he was interrupted.

Q. Okay. You recall being in both interviews?

A. Yes.

Q. You're referring to it as an interrogation technique?

A. I was referring to the second interview, where there are more - - yeah, it's more of an adversarial type of discussion; versus a nice, calm, just tell me your whole story, and we'll go

out the door without a questioning and answering period going back and forth.

Q. So it's fair to say he was interrupted a number of times, that's your memory?

A. Yes. I'll - - I want to say that there's been a - - yes, we did interrupt, redirect, or whatever phrase you might want to mention in regards to the interview and what was being said.

Q. Okay. And if I were to estimate that at 100 times, would you agree with me that it could well have been 100 times in two and a half hours?

A. It probably could have been 100 times.

Q. Okay.

MR. PASCOE: No further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION
BY MR. DAVID:

Q. (Deputy Prosecuting Attorney) You're going to play the edited version, but if you want to play the whole thing, he could play the whole thing, is that right?

A. (Officer Hemstock) Yes.

Q. He's got copies of the whole thing?

A. Yes.

MR PASCOE: Redirect, Your Honor?

THE COURT: You can't have redirect because you didn't do direct. You could have recross once he's done with redirect.

MR. PASCOE: Recross. Thank you, Your Honor. And
--

THE COURT: Well, I don't know that he's done with redirect, yet.

Q. (By Mr. David) No. You were simply just asked to narrow down the time frame?

A. Yes.

Q. So that we didn't spend two and half hours listening to the same material over and over again; isn't that right?

A. I believe so, yes.

THE COURT: All right. Let me perhaps cut short both your redirect and recross.

Ladies and gentlemen of the jury: Exhibits 45 and 46 are complete copies of the recorded information. It's appropriate for the parties, in referring to exhibits, to refer to portions of the exhibits to highlight those portions, just as if they wish to highlight portions of documents, they can do that. Either side can play to you or highlight for you those portions of the exhibits that they think benefit them. So - -

MR. DAVID: With that, then, Judge, nothing.

THE COURT: Recross?

MR. PASCOE: That's acceptable. Thank you, Your Honor.

THE COURT: All right. Now what we're going to do is first of all, you need the officer or can he step down?

MR. DAVID: I think at this point he's done. We can just play the tape.

THE COURT: Do you have any reason for the officer to remain?

MR. PASCOE: No reason for him to remain, Your Honor.

THE COURT: Okay. You're excused, you can go or stay as you choose.

THE WITNESS: Thank you.

THE COURT: Don't discuss your testimony with any other potential witness.

We're going to take a break of about 10 or 15 minutes, just to give you a chance to stretch. We've been in about an hour. And then we'll move on to the next portion, which is apparently playing portions of the exhibits. Leave your notepads there closed. And don't discuss the case with anyone, including yourselves.

- (RP 399, L.16 – 403, L.10)

The State submits that this is nothing more than the trial court instructing the jury as to how they can view and relate to versions of a recording. All the court is telling the jury is that the attorneys can review with them highlighted portions of that exhibit as they wish. The indication is that either side can play or highlight any of those portions of the exhibit which they think will benefit them. (RP 402, L.7-11). Further, neither of the attorneys objected to any of this nor is there any indication to this jury as to what weight they are to give it or how its to be done other than this little proviso.

Article 4, section 16 of the Washington State Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This section prevents the jury "from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted," and it "forbids only

those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial.” State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). The Appellate Court presumes improper judicial comments are prejudicial; the State must demonstrate otherwise. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995).

An impermissible comment conveys to the jury a judge’s personal attitudes toward the case merits or permits the jury to infer from what the judge said or did not say what the judge believed or disbelieved about the questioned topic. Hamilton v. Dep’t of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury. State v. Gitchel, 5 Wn. App. 72, 486 P.2d 325 (1971).

The State submits that this is not a comment on the evidence.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the judgment and sentenced has no contact provisions of two class C convictions where the victims have no contact orders of ten years. The judgment and sentence (CP 239) includes a provision of no contact, lists

the named victims, and does not segregate out those that are from class B and class C felonies.

The State submits that the defense is accurate that this matter needs to be returned. As indicated in State v. Armendariz, 160 Wn.2d 106, 118-119, 156 P.3d 201 (2007), a crime-related prohibition, such as a no contact order, may not exceed the statutory maximum for the underlying offense.

The State believes that a simple order clarifying this would be sufficient. There is no reason for a resentencing.

V. CONCLUSION

The trial court should be affirmed in all respects as relating to issues one and two. Concerning the no contact orders, the State suggests that an order clarifying be entered by the trial court.

DATED this 9 day of July, 2009.

Respectfully submitted:

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By:


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Sherry W. Parker
Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

RICHARD MICHAEL AMARO,

Defendant.

No. 08-1-00289-6

COURT'S INSTRUCTIONS TO THE JURY

G. R. Lewis

SUPERIOR COURT JUDGE

October 30, 2008

DATE

81a

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have

a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services or by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 8

Wrongfully obtains means to take wrongfully the property or services of another.

To exert unauthorized control means, having any property or services in one's possession, custody or control, as a person authorized by agreement or competent authority take or hold such possession, custody, or control, to secrete, withhold or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

A contractor or person acting as a contractor exerts unauthorized control over property, including moneys, if such property was provided to him under an agreement that such funds were to be used for materials and he or she appropriates the funds to his or her own use.

INSTRUCTION NO. 9

By color or aid of deception means that the deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property or services.

INSTRUCTION NO. 10

Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows to be false or fails to correct another's impression which the actor previously has created or confirmed or prevents another from acquiring information material to the disposition of the property involved or promises performance which the actor does not intend to perform or knows will not be performed.

JURY INSTRUCTION NO. 11

Value means the market value of the property or services at the time and in the approximate area of the act.

Whenever any series of transactions which constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be considered in determining the degree of theft involved.

JURY INSTRUCTION NO. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

JURY INSTRUCTION NO. 13

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

INSTRUCTION NO. 14

A person commits the crime of theft in the first degree when he or she commits theft of property or services exceeding \$1500 in value.

INSTRUCTION NO. 15

To convict the defendant of the crime of theft in the first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between December 1, 2002 and September 21, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the defendant obtained control of the property by a series of acts which were connected together as part of a common scheme or plan;
- (3) That the property exceeded \$1500 in value;
- (4) That the defendant intended to deprive the other person of the property; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO: 16

Where property is stolen from the same owner and from the same place by a series of acts there may be a series of crimes or there may be a single crime depending upon the facts and circumstances of each case. If each taking is the result of a separate, independent criminal impulse or intent, then each is a separate crime, but, where the successive takings are the result of a single continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.

JURY INSTRUCTION NO. 17

The State alleges that the defendant committed acts of Theft in the First Degree on multiple occasions. To convict the defendant on any count of Theft in the First Degree, one particular act of Theft in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Theft in the First Degree.

INSTRUCTION NO. 18

To convict the defendant of the crime of theft in the first degree as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 22nd day of September, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

To convict the defendant of the crime of theft in the first degree as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of September, 2006, the defendant by color or aid of deception, obtained control over property of another;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

To convict the defendant of the crime of theft in the first degree as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 25th day of September, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

To convict the defendant of the crime of theft in the first degree as charged in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 29th day of September, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

To convict the defendant of the crime of theft in the first degree as charged in Count 6, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 3rd day of October, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of theft in the first degree as charged in Count 7, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 10th day of October, 2006, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

To convict the defendant of the crime of theft in the first degree as charged in Count 8, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of October, 2006, the defendant by color or aid of deception, obtained control over property of another;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

To convict the defendant of the crime of theft in the first degree as charged in Count 9, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 30th day of December, 2006, the defendant by color or aid of deception, obtained control over property of another;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 26

To convict the defendant of the crime of theft in the first degree as charged in Count 10, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 24 to January 29, 2007, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

To convict the defendant of the crime of theft in the first degree as charged in Count 11, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 8th day of February, 2007, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 28

To convict the defendant of the crime of theft in the first degree as charged in Count 12, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 6th day of March, 2007, the defendant by color or aid of deception, obtained control over property of another;
- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

A person commits the crime of theft in the second degree when he or she commits theft of property or services exceeding \$250 in value but not exceeding \$1500 in value.

INSTRUCTION NO. 30

To convict the defendant of the crime of theft in the second degree as charged in Count 14, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between September 1, 2007, and October 31, 2007, the defendant wrongfully obtained or exerted unauthorized control over, or, by color or aid of deception, obtained control over property of Marlys Johnston;
- (2) That the property exceeded \$250 in value but did not exceed \$1500 in value;
- (3) That the defendant intended to deprive Marlys Johnston of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 31

To convict the defendant of the crime of theft in the second degree as charged in Count 16, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between September 1, 2007, and October 31, 2007, the defendant wrongfully obtained or exerted unauthorized control over, or, by color or aid of deception, obtained control over property of Evelyn Logie;
- (2) That the property exceeded \$250 in value but did not exceed \$1500 in value;
- (3) That the defendant intended to deprive Evelyn Logie of the property;
and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 32

A person commits the crime of Contracting Without a License when he or she advertises, offers to do work, submits a bid, or performs any work as a contractor without first being registered or when such registration is suspended or revoked.

INSTRUCTION NO. 33

To convict the defendant of the crime of Contracting Without a License in Count 13, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between September 1, 2006, and May 31, 2007, the defendant advertised, offered to work, submitted a bid, or performed any work as a contractor;
- (2) At the time he was not registered as a contractor or when such registration was suspended or revoked;
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 34

To convict the defendant of the crime of Contracting Without a License in Count 15, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between September 1, 2007, and October 31, 2007, on an occasion separate from that charged in Count 17, the defendant advertised, offered to work, submitted a bid, or performed any work as a contractor;
- (2) At the time he was not registered as a contractor or when such registration was suspended or revoked;
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

To convict the defendant of the crime of Contracting Without a License in Count 17, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between September 1, 2007, and October 31, 2007, on an occasion separate from that charged in Count 15, the defendant advertised, offered to work, submitted a bid, or performed any work as a contractor;
- (2) At the time he was not registered as a contractor or when such registration was suspended or revoked;
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 36

A "contractor" includes any person, firm, corporation, or other entity who, in the pursuit of an independent business, undertakes to, or offers to undertake, or submits a bid to construct, alter, repair, add to, subtract from, improve, develop, move, wreck, or demolish any building, or other structure or improvement attached to real estate, or to do any part thereof including the installation of carpeting or other floor covering, the erection of scaffolding or other structures or works in connection therewith, the installation or repair of roofing or siding, performing tree removal services, or cabinet or similar installation.

INSTRUCTION NO. 37

An expiration, cancellation, or revocation of an insurance policy of a registered contractor automatically suspends the contractor's registration. No further steps are required by the Department of Labor and Industries to revoke the license.

INSTRUCTION NO. 38

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, verdict forms for recording your verdict. Some exhibits and visual aids may have

been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 39

You will also be given special verdict forms for each count which charges the crime of Theft in the First Degree. If you find the defendant not guilty on any particular count, do not use the special verdict form for that count. If you find the defendant guilty on one of these counts, you will then use the special verdict form for that count and fill in the blanks with the answers "yes" or "no" according to the decisions you reach. In order to answer a question on any special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer that question "no".

INSTRUCTION NO. 40

If you find the defendant guilty of any count of Theft in the First Degree, then as to that particular count, you must determine if any of the following aggravating circumstances exists:

Whether the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime?

Whether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance?

Whether the defendant used a high degree of sophistication or planning when committing this crime?

Whether the crime was a major economic offense or series of offenses?

The State has the burden of proving the existence of any aggravating circumstance beyond a reasonable doubt. In order for you to find the existence of an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

INSTRUCTION NO. 41

To find that a crime is a Major Economic Offense, at least one of the following factors must be proved beyond a reasonable doubt:

- (1) The crime involved multiple incidents per victim; or
- (2) The crime involved attempted or actual monetary loss substantially greater than typical for the crime; or
- (3) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
- (4) The defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.

The above factors are alternatives. This means that, if you find from the evidence that any one of the alternative factors has been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form. To return a verdict of "yes", the jury need not be unanimous as to which of the alternatives has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

INSTRUCTION NO. 42

A high degree of sophistication or planning means conduct that goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime. In deciding whether the defendant demonstrated a high degree of sophistication or planning, you may consider the length of time the defendant planned the offense, or the defendant's use of any specialized knowledge.

INSTRUCTION NO. 43

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

INSTRUCTION NO. 44

A victim is "particularly vulnerable" if he or she is more vulnerable to the commission of the crime than the typical victim of Theft in the First Degree. The victim's vulnerability must also be a substantial factor in the commission of the crime.

FILED
 COURT OF APPEALS
 DIVISION II
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 STATE OF WASHINGTON
 BY Ysa
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
 DIVISION II

STATE OF WASHINGTON,
 Respondent,

No. 38589-9-II

v.

Clark Co. No. 08-1-00289-6

RICHARD MICHAEL AMARO,
 Appellant.

DECLARATION OF
 TRANSMISSION BY MAILING

STATE OF WASHINGTON)
 : ss
 COUNTY OF CLARK)

On July 10, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Catherine Glinski Attorney for Appellant PO Box 761 Manchester, WA 98353
	Richard Amaro, DOC #324993 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
 Date: July 10, 2009.
 Place: Vancouver, Washington.