

ORIGINAL

No. 28619-3-III
COURT OF APPEALS
DIVISION III
OF
THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Roy A. Welch,
Appellant

Appeal from the Superior Court of Stevens County

BRIEF OF APPELLANT

Attorney for Appellant Roy A. Welch:
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I. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

1. The trial court erred in admitting EX 48 over a defense objection that the summary was hearsay evidence, violating the defendant's sixth amendment right of confrontation.
2. The trial court erred in failing to grant the defense motion for mistrial or a continuance due to the state's late disclosure of evidence generated during the trial as EX 49 and 50.
3. The trial court committed reversible error by incorrectly instructing the jury on the aggravating factors requiring vacating of the enhancement.
4. The trial court erred in sentencing the defendant to a sentence enhancement pursuant to RCW 9.94A.535(3)(d) without the jury making a finding regarding a "major economic offense or series of offenses".
5. The trial court committed reversible error by making conclusions of law beyond those allowed by the jury's findings of fact in imposing an exceptional sentence.
6. The trial court erred in imposing restitution for uncharged offenses and in amounts unproven at trial.

II. STATEMENT OF THE CASE

A jury convicted Roy A. Welch of First Degree Theft and three of five counts of forgery charged in counts four, five, and six. (RP 470-471; CP 32-37) Additionally, the jury returned a special verdict of violation of a position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime. (RP 471-472; CP 40)

Between February 1, 2006 and May 31, 2007, it was alleged that Mr. Roy Welch committed First Degree Theft by cashing checks without the owner's

authority. (CP 1-2) The state charged five counts of forgery based upon five separate checks. (CP 1-4) An aggravating factor was alleged with First Degree Theft that the defendant used his “position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” (CP 1-2) The defendant timely filed this appeal.

III. INTRODUCTION

On September 2, 2008 Mr. Roy Anthony Welch was arraigned in Stevens County Superior Court on charges of First Degree Theft between February 01, 2006 to May 31, 2007 and alleging “an aggravating factor that the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, pursuant to RCW 9.94A.535(2)(n).” (CP 1-2) At the same time Mr. Welch was arraigned on five counts of forgery: Count 2 instrument #3620 in amount of \$4,500.00 (CP 2), Count 3 instrument #3700 in amount of \$1,571.01 (CP 3), Count 4 instrument #3966 in amount of \$1,131.76 (CP 3), Count 5 instrument #4096 in amount of \$2,750.00 (CP 4), and Count 6 instrument #4156 in amount of \$2,156.17 (CP 4).

The trial began on October 12, 2009 before the Honorable Alan Nielson in Stevens County Superior Court. The court took argument regarding the introduction of financial records. Defense argued that a recent U.S. Supreme Court case of *Melendez-Diaz* requires people who maintain business records be available at trial. (RP 23-25) The prosecution called Paul Hoffman as their first

witness. (RP 26) Mr. Hoffman testified that he started Paul Hoffman and Company in November or December of 2000. (RP 27) The business sold insurance, primarily commercial lines of insurance. (RP 27) Eliza Alby was his first employee who handled all of the office work and office management (RP 28), and was his first bookkeeper. (RP 29)

A lady named Sandra was the bookkeeper after her, followed by another lady who worked in 2005 or 2006. (RP 29 lines 13-21) A decision was made to hire Roy Welch "to help with customers and also to do the accounting." (RP 29 lines 13-21) Mr. Hoffman believed that they hired Roy Welch in either 2004 or 2005. (RP 30 lines 7-8) In late 2005, Sandra left and they needed Roy Welch to take care of customer service. (RP 31 lines 23-25) Mr. Welch later assumed the added responsibility for general bookkeeping. (RP 33 lines 15-22)

Mr. Hoffman maintained he was "on the road most of the time." Eliza was the office manager. (RP 34 lines 2-4) Roy Welch would print out checks and Eliza would sign or Mr. Hoffman would sign when he returned to the office. (RP 35 lines 1-6) Mr. Hoffman could not recall if Mr. Welch ever wrote out checks by hand. (RP 35 lines 10-12) Mr. Hoffman was on the road a lot, at least three days a week. (RP 35 lines 20-25) He would come in on Fridays to find out what was going on and plan the following week. (RP 36 lines 16-25) He was very busy just planning to go back out on the road for the following week. (RP 37 lines 4-11)

The state sought to introduce through Paul Hoffman a check for \$4500.00 written to Roy Welch marked as EX 1A. The defense objected that Mr. Hoffman did not maintain this business record and the bank did. (RP 43 lines 20-25) Mr. Hoffman testified he did not sign EX 1A (RP 44), EX 2A check #3649 (RP 45), EX 3A check #3650 (RP 46-47), EX 4A check #3664 for \$627.54 (RP 47), EX 5A check #3663 for \$1,271.00 (RP 48), EX 6A check #3666 for “twelve hundred dollars” (RP 49-50), EX 7A check #3665 for \$433.66, EX 8A check #3700 for \$1,571.01 written to Roy Welch (RP 51-52), EX 9A check #3706 for \$338.97 (RP 52-53), EX 10 check #3711 for \$1,133.91 to Roy Welch (RP 53-54), EX 11 check #3730 for \$600.00 to Roy Welch (RP 54-55), EX 12A check #3742 amount of \$976.94 to Roy Welch (RP 55), EX 13A check #3743 amount of \$325.44 to Roy Welch (RP 56), EX 14 check #3744 for \$298.62 to Roy Welch (RP 57-58), EX 15A check #3762 written for \$600.00 to Roy Welch, (Defense counsel objected as to foundation because Mr. Hoffman was unable to authenticate the check based upon hearsay). The court overruled that this was only the authentication of the exhibits. (RP 59) EX 16A identified as a check for Paul and Kathryn Hoffman Properties (RP 60-61), EX 17A check #3832 for \$750.00 to Roy Welch (RP 62), EX 18A check #3844 fir \$978.84 to Roy Welch. (RP 63-64) Mr. Hoffman testified that he had not signed any of the checks to which he viewed in his own testimony.

The trial court requested counsel restate a “sidebar objection” made to the introduction of the above listed exhibits. (RP 64 lines 18-22) Defense counsel objected to introduction of the copies as though they were originals under the business records exception. (RP 65) Additional basis for the objection included lack of foundation, best evidence rule, and denial of right of confrontation because Mr. Hoffman does not maintain the checks in his records. The prosecution responded that Mr. Hoffman maintains the copies he obtained from the bank. (RP 68) As to Best Evidence Rule, it allows for the use of exact copies as though they are originals.

The trial court ruled that business records exception failed because Mr. Paul Hoffman was not the custodian of the records. (RP 71-72) The bank representative may be able to establish the record for the admission under the business record exception. (RP 72) The Best Evidence Rule does not come into play because evidence is that these are exact copies of the bank records. (RP 73) The court elected to address the confrontation issues raised pursuant to *Crawford* ruling that the business records exception is a deeply rooted exception to hearsay. (RP 73 lines 12-21) The trial court added this is not something testimonial “being something prepared for purpose of use in a criminal trial or in a court proceeding” but were prepared in the normal course of business. (RP 74)

Over defense objections the state continued to introduce copies of checks: EX 19A check #3850 to Roy Welch for \$750.00 with Paul Hoffman Sr. name but

not his signature (RP 76), EX 20 check #3868 written to Roy Welch for \$900.00 not signed by Paul Hoffman. (RP 77) Defense counsel then re-affirmed that there was a standing objection to the introduction of all of these checks. (RP 78 lines 1-10)

The state proceeded to introduce EX 21 check #3895 to Roy Welch in the amount of \$925.00 not signed by Paul Hoffman Sr. (RP 79), EX 22 drawn on Paul or Kathryn Hoffman Properties check #1495 to Roy Welch for \$200.00 (RP 79-80), EX 23 check #3908 to Roy Welch for \$935.86 (RP 80-81), EX 25 check #3950 to Roy Welch for \$500.00 (RP 81-82), EX 26 check #3964 to Roy Welch for \$250.00 (RP 82-83), EX 27 for \$1, 131.76 but Mr. Hoffman did not know the check number and defense counsel objected based upon foundation which was sustained. (RP 83-85) Mr. Hoffman explained all of these checks had his name but not his signature.

The state continued with EX 28 check #3975 for \$575.00 signed by name Paul Hoffman Sr. (RP 85-86), EX 29 check #1513 to Roy Welch for \$200.00 drawn on Paul and Kathryn Hoffman Properties (RP 86-87), EX 30 check #4054 Paul Hoffman and Company (RP 87), EX 31 check #40 to Roy Welch for \$1, 412.34 (RP 88), EX 32 check # 1529 to Roy Welch (RP 89-90), EX 34 check #4097 to Roy Welch in amount of \$550.00 (RP 90-91), EX 36 Paul Hoffman and Co. check #4159 to Roy Welch for \$1,975.00 (RP 91-92), EX 37 Paul Hoffman Inc. check #4109 to Roy Welch for \$2,793.00 (RP 92-93), EX 38 Paul Hoffman

Co. check #4118 to Roy Welch for \$1,325.78, EX 39 check #1539 for \$600.00 to Roy Welch with Paul Hoffman Sr. name (RP 94), EX 40 Paul Hoffman Company Inc. check #4138 for \$1,341.88 to Roy Welch (RP 94-95), EX 41 Hoffman Properties check #1544 to Roy Welch for \$200.00 (RP 95-96), EX 42 Paul Hoffman and Co. check #4150 to Roy Welch for \$1,148.32 (RP 97-97), EX 43 Paul Hoffman and Company check #4150 to Roy Welch for \$1,750.00 (RP 97-98), EX 44 Paul Hoffman and Company check #4320 to Roy Welch for \$1,977.83 (RP 98), EX 45 Paul Hoffman and Company check #4235 to Roy Welch for \$2,896.00 (RP 99), EX 46 Paul Hoffman and Co. Inc. check #4238 (RP 100), EX 24 check on Paul Hoffman and Company Inc. check #3944 to Roy Welch for \$950.00 (RP 101-102) (RP 102), and EX 35 check #4156 on Paul Hoffman and Company Inc. with the name of Paul Hoffman Sr. (RP 103) Mr. Hoffman maintained all the checks had variations of his name but not his signature.

The state then questioned Mr. Hoffman as to where records for the company were kept. He responded “written record on Quickbooks.” (RP 103 line 24) Mr. Hoffman testified Roy Welch was primarily responsible for inputting information into the computer. (RP 104) He had a bookkeeper that he instructed to go in and prepare a report. (EX 48A) (RP 106) He has a new bookkeeper and he does “not question these records.” (RP 105)

Mr. Hoffman stated he had not been trained in Quickbooks and that the report (EX 48A) offered by the prosecutor was created by his bookkeeper. (RP

107) Jennifer Payton prepared the report (EX 48A) and he did not know what entry she used. (RP 108) He did not go into Quickbooks but trusted her and never verified the accuracy of the report. (EX 48A) (RP 108) Defense objected to the introduction of the report because Mr. Hoffman did not prepare the report but Jennifer Payton prepared it and there is a lack of foundation to admit the report. (RP 108)

The court held that the document is a summary of the evidence prepared by Jennifer Payton the bookkeeper. (RP 111 lines 5-13) The report reads in upper right hand corner “check forged in corporate account.” (RP 111) The report reads: “I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct...true and correct to the best of my knowledge Paul Hoffman Sr. dated 6/10/08.” (RP 111) Defense counsel objects to introduction of report (EX 48A) as hearsay prepared by a bookkeeper in anticipation of trial signed by Mr. Hoffman who doesn’t know how to operate Quickbooks and did not prepare the document. (RP 112 lines 13-20)

The prosecutor said he believed that Mr. Hoffman “verified some of this, and when he was going through this with...” The prosecutor maintained it was not hearsay but the court held it was hearsay. (RP 115) Defense counsel argued that the failure to call the bookkeeper denied the defense the opportunity to question her about the report or entries and Mr. Hoffman has a pecuniary interest in this proceeding. (RP 118-119) It was acknowledged by the court that there had

been a number of bookkeepers “Sandra Speel” and Louisa Glenn. (RP 123 lines 7-11) The trial court recognized that hearsay would be at issue in a report prepared by a bookkeeper. (RP 121 lines 1-9)

October 13, 2009, Mr. Hoffman returned to court with documents allegedly printed from his Quickbooks program. He printed a document called Audit Trail which he brought to court. The ledger and audit trail were prepared to show changes made to the various entries. (RP 135)(EX 49 and EX 50)

At this point, the trial court marked EX 48 as the document that had been offered by the prosecution on October 12, 2009 as a summary. (RP 137 lines 16-25) Defense counsel objected to summary as it does not meet a business record definition under RCW 5.45.020. The witness did not prepare the record. He testified the document was prepared by his bookkeeper, it was not prepared in the regular course of business (RP 240-241), or prepared at or near the time of the event, the witness is unable to testify to the method or time of preparation and EX 48 is not a sequential document that shows all the transactions or all the entries. (RP 138)(EX 48 and 48A)

Beyond the objection, based upon RCW 5.45.020 the defense argued that in *Melendez-Diaz v. Massachusetts* the U.S. Supreme Court ruled on June 25, 2009, that if someone is testifying about a document there needs to be an opportunity to examine the person who prepared the record to establish the purpose of the record and whether the record was prepared in anticipation of

litigation. (RP 138) The defense objected to bringing new evidence in the midst of trial including records and documents. (RP 139) The Court interrupts pointing out that these new documents are brought to support the use of EX 48 and demonstrate the reliability and trustworthiness of EX 48. (RP 139 lines 8-17) The defense objected to the timeliness of the discovery brought in in the midst of trial. (RP 140 lines 1-7) Defense noted that a discovery demand was made and filed in this case. (RP 140 lines 1-7)(CP 010-013) The defense raises issues that the use of the document denies the defendant his right of confrontation. (RP 141) The defense advises that the records violate the right of confrontation under *Crawford*. (RP 142 lines 3-10) The defense moved for a mistrial based upon the late disclosure. (RP 142 lines 7-21) When the court denied the mistrial for the late disclosure the defense sought a continuance to prepare for the new evidence. (RP 151)

The court ruled that *State v. Smith*, 16 Wn. App. 425, 558 P.2d 265 (1976) from the Tegland section on computer printouts made under general supervision. That the summary of certain business records were admissible. (RP 143 lines 6-10) Then the court also cited to a related case of *State v. Ben Neth*, 34 Wn. App. 600, 663 P.3d 156 (1983) holding bank officials could lay foundation for computer printouts of bank records. (RP 143 lines 12-22) The court denied the defense motion for a mistrial for late discovery disclosure and motion for any remedy and stated that the defense could look at the report that was generated

here. (RP 144 lines 6-12) The court clarified that it would admit EX 48 as a business record provided the prosecution laid a foundation. (RP 145 lines 1-5) The defense points out other issues with EX 48: (1) – it has on it “checks forged in corporate account” (2) – in the “notes” it says “forged check made payable to Department of Labor.” (RP 145 lines 6-10) The trial court states that the document is more of a narrative or a conclusion. (RP 145 lines 11-12) The defense responds that the issue of “forged documents” is the issue before the jury. (RP 145 lines 15-23) The court states that those conclusions can be redacted from the document. (RP 146 line 1-5)

The court recessed to let the defense review the documents prepared during the trial. (RP 148 lines 1-11) After the recess the defense identified the exhibits as 24 pages or a PCHI checking that is similar to a check register for the account at issue and 500 pages of what has been identified as an “audit trail” that runs from January 2, 2006 to June 30, 2007. These are the bookkeeping records. (RP 148-149)(EX 49 and 50)

EX 49 was designated as the 500 pages that were printed off at 7:56 p.m. on October 12, 2009 during the trial. (RP 149) It purports to be the audit trail on the account at issue. The document was provided to defense during the trial on October 13, 2009. (RP 149)

In view of the 500 plus pages and 24 pages only provided during trial the defense sought a continuance to prepare for and have these documents reviewed

by an expert on Quickbooks. (RP 151) The prosecutor deferred to the court on the continuance request. The court denied the defense request for a continuance. (RP 152 and PR 144 lines 6-12) It was the trial courts decision to consider admission of EX 48 as a summary of EX 49 and 50.

A hearing was held outside of the presence of the jury. (RP 154 line 10) Mr. Hoffman was called to the stand for testimony regarding the exhibits. (RP 155) Jennifer Payton his bookkeeper prepared EX 48. (RP 155) Mr. Hoffman testified that he printed off what he identified as a register. (RP 155) EX 49 is identified as a register from January 1, 2006 to June 30, 2007. (RP 156)(EX 49) Mr. Hoffman stated he was up until about eleven o'clock to find these documents. (RP 156-157) Afterwards he printed off the audit trail which was 500 pages, referred to a voluminous, and shows checks and activity on the account or changes. (RP 157) The audit trail was marked as and identified as EX 50.(EX 50)

Mr. Hoffman admits on voir dire examination that he had little training on Quickbooks. (RP 159) Somebody else routinely operates the accounting program. (RP 159) Natalie Culver is the person who routinely operates Quickbooks. (RP 159 lines 16-18) EX 48 was prepared by Jennifer Payton the bookkeeper from 2008. (RP 160) Jennifer Payton has been replaced by a person named Natalie. (RP 160) Jennifer Payton prepared EX 48 without any active participation from Mr. Hoffman. (RP 161) Other than last night he had not used Quickbooks at all since the summer of 2008. (RP 161) He has entrusted three or four people discussed to

work on Quickbooks. (RP 161) Mr. Hoffman has never entered anything in Quickbooks but did sit down a couple of times with Jennifer Payton. (RP 161) His bookkeeper's have told him that changes can be made that don't appear on the report. (RP 165) He could not testify based upon his experience if there were changes made by any of his three or four bookkeepers. (RP 165) In fact he is not even in the business on a day to day basis. (RP 165) He has no knowledge of whether or not anyone of the bookkeepers made changes to the records. (RP 166) Mr. Hoffman went through the records from June 1, 2006 through June 30, 2007 to verify the summary in EX 48 prepared by Jennifer. (RP 166-167) Mr. Hoffman does not know if the audit trail can be turned off or how to tell if it is turned off. (RP 168)

The prosecutor told the court he was not seeking to admit EX 48. At that the trial court said it would grant the defense motion as inadmissible finding it could only be admitted as a business record and held the hearing established the document was reliable enough to be admitted under a business record exception. (RP 170)

In arguing for the use of EX 48 the prosecutor argued *Washington v. Richard Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983) and *State v. James Kane*, 23 Wn. App. 107 both dealing with computer generated evidence. (RP 171) The prosecutor argued that *State v. Smith* allowed computer printouts of bank records without bringing the employee who prepared the record. (RP 172)

Defense counsel argued EX 48 does not meet the business record requirement of RCW 5.45.020 where seven points must be met. Mr. Hoffman cannot testify to the mode of preparation, the record is prepared in the regular course of business, or at or near the time of the act. He cannot tell us what the sources of the information were or if any changes were made. (RP 175-176) Mr. Hoffman cannot tell us what the audit feature is or whether it can be turned on or off. (RP 176) Mr. Hoffman said that Jennifer Payton, Natalie Culver, Roy Welch, Louise Glen, or Sandra Steel were people involved in Quickbooks operation. (RP 176) Defense counsel argued the records downloaded last night should have been downloaded at or near the time the event occurred. The records should have been downloaded to a disc at or near the time the case was investigated. (RP 176)

Further, under *Melendez-Diaz v. Massachusetts* and the 6th Amendment the defendant is guaranteed the right of confrontation of witnesses against him. The clauses' ultimate goal is to ensure the reliability of the evidence. It is a procedural rule requiring the reliability of the evidence be tested in the crucible of cross examination. Defense argued further that dispensing with confrontation because the testimony is obviously reliable is akin to dispensing with the jury because the defendant is obviously guilty. (RP 177)

The government failed to maintain a disc from the date this was originally discovered. (RP 178) It is uncertain if the records have been modified or altered and EX 48 therefore is not reliable. (RP 178) EX 48 was prepared by an employee

of Mr. Hoffman's for purposes of the litigation, to be used in this trial. He is testifying about work someone else did that is clearly hearsay. It is not a business record. (RP 179) Lastly, this will deny the defendant his right to cross examine and to question a witness about the evidence used in court against him. (RP 179)¹

EX 48 is exactly the same sort of document the defense argued. It was not prepared in the regular course of business but prepared it in anticipation of this litigation. The man testifying didn't even supervise or cannot testify that it was prepared in the regular course of business. (RP 180)

The cases cited by the prosecution are distinguishable because they talk about admitting checks maintained by a bank. The difference is that bank checks are processed routinely over and over again the same way always. They are routinely prepared one after another and done thousands of times. The bookkeeping function here is not such a routine activity as processing checks. (RP 181)

The defense renewed its motion for a continuance or mistrial based upon the late disclosure of discovery in the form of bookkeeping records. (RP 182) The

¹ The defense points out that *Melendez-Diaz* reads as follows: "documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109 (1943), make that distinction clear, that we held an accident report provided by an employee of a railroad company did not qualify as a business record because although kept in the regular course of business, it was calculated for use essentially in the court, not in business." (RP 179-180)

prosecution argued that *Melendez-Diaz* dealt with other things and does not require a specific person other than the custodian of the records. (RP 185)

The court rules the business records statute must be complied with and the right of confrontation question must be addressed. (RP 185) First the court addressed the statutory requirement finding Mr. Hoffman is the supervisor, custodian, and qualified person. (RP 186) That Mr. Hoffman watches the profit and loss statements. He comes in on Fridays to get an update on what is going on with the corporation. (RP 186) The court finds Mr. Hoffman to be credible. (RP 186) The court ruled that the summary was to be redacted to remove “any reference to forgery or fraud” which is narrative and gets to the ultimate issue. (RP 187 lines 10-16) Work performed overnight shows the reliability and credibility of Mr. Hoffman. (RP 187 lines 19-25) The court relies on *Ben-Neth*, 34 Wn. App. 600, 663 P.2d 156 (1983) referring to *State v. Smith* at P.604. (RP 188) The court recognizes that Mr. Hoffman does not supervise the work of the bookkeeper. (RP 189 lines 1-8) Ultimately the court held that it goes down to the question of reliability and finds this evidence is reliable. (RP 189) The court found EX 48 was reliable based upon EX 49 and 50. (RP 190) The court finds Quickbooks is computer equipment that is standard. (RP 190) Next as to *Melendez-Diaz v. Massachusetts*, the court rules that the document does not come within that line of cases. (RP 192 lines 2-13) There is no confrontation problem and EX 48 will be admitted. (RP 192)

The jurors return and Mr. Hoffman returns to the stand and is given EX 48. He testifies he reviewed the Quickbooks system and the information is accurate. (RP 195) The defense objects to the use of EX 48 and makes a standing objection to the use of EX 48. The court again notes the defense objection. (RP 195)

Mr. Hoffman testifies from EX 48 that check #3626 dated February 21, 2006 in Quickbooks went to the Dept. of Labor. (RP 195)²

² He testifies that:

1. Check 3649 date 3/7/2006 was payable to Paul Hoffman Sr. and he did not receive it. (RP 196)
2. Check 3650 dated 3/7/2006 was payable to Paul Hoffman Sr. and he did not receive it. (RP 196)
3. Check 3663 dated 3/20/2006 was payable to Paul Hoffman Sr. and he did not receive it. (RP 196)
4. Check 3664 date 3/17/2006 to Paul Hoffman Sr. but he did not receive it. (RP 196)
5. Check 3666 date 3/20/2006 to Western Building Material Association for \$1200. (RP 197)
6. Check 3700 date April 4, 2006 payable to Roy Welch he states he did not authorize. (RP 197)
7. Check 3706 April 19, 2006 made out to Progressive Auto. (RP 197)
8. Check 3711 April 25, 2006 made out to Western Building Material. (RP 197)
9. Check 3730 dated May 5, 2006 payable to Paul Hoffman Sr. it does not ring bell that he received it. (RP 198)
10. Check 3742 dated May 10, 2006 payable to Paul Hoffman Sr. for \$976.94. (RP 198)
11. Check 3743 dated May 10, 2006 payable to Premium Financing. (RP 198)
12. Check 3744 dated May 10, 2006 payable to G-Net Office Equipment. (RP 199)
13. Check 3762 dated May 24, 2006 payable to Eliza Alby. (RP 199)
14. Check 3832 dated July 7, 2006 payable to Card Member Services. (RP 199)
15. Check 3844 dated July 25, 2006 payable to cash.
16. Check 3850 dated July 28, 2006 payable to Chase Card Services. (RP 200)
17. Check 3868 dated August 9, 2006 payable to Paul and Kathy Hoffman for \$900.00 he did not recall receiving that check. (RP 201)
18. Check 3895 August 30, 2006 payable to Paul Hoffman Sr. (RP 202)
19. Check 3908 September 8, 2006 payable to Paul Hoffman Sr. he is not aware that he ever received the check. (RP 202)
20. Check 3944 October 5, 2006 payable to cash. (RP 202)

In looking at the records for check number 3620 it said void but in the ledger it said it was payable to Roy Welch.

The court takes a recess for the prosecution to complete redactions to EX 48. (RP 205) The court instructs that EX 48 up to this point will now be EX 48A which will be the original before redactions. (RP 206) The jury will be given the redacted copy now EX 48. (RP 206)

The defense pointed out that the redactions on EX 48 should include the redaction of the certification under the penalty of perjury. (RP 207) The court adds that this is not normally in a business record but seemingly would be in preparation for court. (RP 207 lines 23-25) The defense agrees pointing out that it is not a business record noting the courts ruling. (RP 208 lines 1-4) The court restates for the record that EX 48 is now redacted and EX 48A is the original EX 48 prior to the redactions. (RP 209 lines 8-16) The defense renews all of the earlier objections to the admission of EX 48. (RP 209) The prosecutor agrees to the standing objection to the admission of EX 48. (RP 210) The prosecution moves to introduce EX 48 and the defense objects and maintains a standing objection to EX 48 for reasons in the record. (RP 211) EX 48 is admitted over defense objection. (RP 211)

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21. Check 3950 October 13, 2006 payable to Paul Hoffman Sr. (RP 202)
 22. Check 3964 October 16, 2006 payable to Best Buy. (RP 203)

Check # 3540 is identified as EX 51 which is a payroll check signed by Paul Hoffman Sr. (RP 212) EX 52 is identified as a check signed by Paul Hoffman made out to Roy Welch for \$35.00 and signed by Paul Hoffman Sr. (RP 213-214) EX 53 is check #1467 made out to Roy Welch with the signature of Paul Hoffman Sr. on the check. The exhibits were admitted by the court. (RP 214)

Mr. Hoffman testified that expenses were reimbursed to employees on a weekly basis. (RP 218) The payment arrangements for Mr. Welch included payments for commissions. (RP 219) Mr. Welch was reportedly given a separate check for work he did on the Hoffman Properties. (RP 220) Mr. Hoffman testified he was not sure how Mr. Welch was paid for commissions or when it was paid. (RP 221 lines 6-7) Over the years they had various bookkeepers. First Eliza, then Sandra in 2004, then another lady whose name he could not recall, then Roy, and then Jennifer Payton. (RP 222)

When Mr. Hoffman came in from the road he would review the profit and loss statements. Occasionally, he would get a statement of what checks were issued and where they went. (RP 223) He would probably do this once a month. (RP 223) He never balanced the books. That was for the bookkeepers. (RP 224) Mr. Hoffman was unsure if backups were kept of the Quickbooks records. (RP 225) He never ordered a complete copy of the Quickbooks records when they discovered that money was missing. (RP 225) The police were never given a copy of the Quickbooks records at the time the losses were discovered. (RP 226) He

was unsure if a copy of the complete Quickbooks program was made because that was Ms. Alby's responsibility. (RP 226) Mr. Hoffman was uncertain if Jennifer Payton could have made modifications to the Quickbooks program. (RP 226) He was uncertain if anyone made changes to Quickbooks but would assume that this could be done. (RP 227)

EX 48 which was a report admitted and prepared by Jennifer Payton was not a report that they prepare in the normal course of business. (RP 240 lines 23-25) The report was not prepared weekly, monthly, quarterly, bi-annually, annually, and it was prepared only one time and never in the course of business. (RP 241) It was only prepared after the investigation began. (RP 241)

The state calls Eliza Alby to the stand. Ms. Alby testifies she worked for Paul Hoffman at Paul Hoffman Company Incorporated from April, 2001. Her duties included all kinds of assistance to Paul Hoffman including bookkeeping. (RP 264) She started the bookkeeping using a Quicken bookkeeping program. (RP 264) She was the sole employee from April 2001 until January 2002. (RP 264) She later became an accounts manager selling insurance and servicing customer accounts. (RP 264) The Quicken program for bookkeeping was implemented from a paper method that Mr. Hoffman had used. (RP 265) The Quicken program was a program that she had used at her home. (RP 265) In March 2002, a bookkeeper was hired and she only signed checks. It was arranged with the bank that she could sign checks for the company. (RP 266) Ms. Alby also

had the authority to sign checks for Paul and Kathryn Hoffman Properties. (RP 266) The persons authorized to sign checks were Paul, Kathryn, and Ms. Alby. (RP 267) Mr. Roy Welch was hired in the summer of 2004. (RP 267)

Her duties were then that she took charge of the day to day operation of the business. (RP 269) She would sign checks but most of her time was involved in taking care of customer accounts and focused on customer needs. (RP 270) Her role in the bookkeeping was limited to seeing that the checks were signed and the bills were paid. (RP 270)

The bookkeeping was first handled by a lady named Sandra until 2005, then a gal named Louise until early 2006, when Roy Welch took over the bookkeeping. (RP 274) Mr. Welch took over the bookkeeping duties in late 2005 or early 2006. (RP 274) After Roy Welch left in May 2007 they hired a bookkeeper named Jennifer. (RP 275)

The Quicken program used was something she used until Sandra was hired as bookkeeper and they had Sandra trained on Quickbooks. (RP 277) She believes that there were upgrades to the Quickbooks program. (RP 278)

In December 2007, she had a call from a collection agency. (RP 272) The call led her to review payments on the account and a finding of a check not signed by Paul Hoffman. (RP 273) Ms. Alby found a check that in Quickbooks was to the credit card company while it was actually written to Roy Welch. (RP 273) In

the bank statement she had copies of the checks that came back and she believed the check looked suspicious. (RP 274)

When the discrepancies were discovered in the accounting, Jennifer Payton was the bookkeeper and Jennifer did backups. (RP 281) They did not provide a copy of a backup of the computer to anyone after the problems were discovered. (RP 281) Ms. Alby had the ability to access the Quickbooks program at the company. (RP 282) Mr. Hoffman did not have the knowledge of the computer program to access Quickbooks. (RP 283) He would go to Jennifer the bookkeeper. (RP 283 lines 19-25) Jennifer replaced Roy as bookkeeper. (RP 284) The bookkeeper before Roy was Louise Glenn. (RP 284) EX 48 was provided to the witness and she stated the bookkeeper would prepare reports such as this from Quickbooks. (RP 285) Ms. Alby had no idea which Quickbooks program the company utilized. (RP 285)

Karrel Miller was called as a witness by the prosecution. (RP 300) Ms. Miller is a manager for American West Bank in Chewelah. (RP 301) She is familiar with the records that are processed through her branch of American West Bank. (RP 302) EX 1 and EX 1A identified as a check on Mr. Hoffman's account and a deposit slip to Roy Welch's account. (RP 302) There are tracking numbers on each document to show that they were processed through her branch. (RP 303-304) Ms. Miller identifies deposit slips for Roy Welch's account EX 2-9, 12, 13, and 15-19 were admitted. (RP 306) The prosecutor offers EX 2A, 3A, 4A, 5A,

6A, 7A, 8A, 9A, 10, 11, 12A, 13A, 14, 15A, 16A, 17A, 18A, 19A, 20, 21, 22, 23, 24, 25, 26, 27, 28 to 46 and then EX 51-53 were admitted. (RP 307-308) The defense objected to the introduction of checks for anything not charged. (RP 307) The court overruled the defense objection. (RP 307-308) The state then introduced EX 24 and EX 24A as a check from the Hoffman account and a deposit slip to Roy Welch's account. (RP 308) The court denied admission based upon defense objection due to foundation. (RP 309) Ms. Miller admits she has no idea if the checks were payments to Mr. Welch for work performed. (RP 317)

After introducing the documents the court allowed the defense to supplement the argument and objection made regarding introduction of all of the checks made at an unrecorded sidebar. (RP 319 lines 19-22) The defense restates the argument. The documents were cumulative and beyond the allegation of forgery and the theft in the first degree. (RP 319-320) The documents were not relevant, cumulative, and beyond the scope of the charges. (RP 319-320)

The prosecution argues that due to the charging of the aggravating factors and the first degree theft the documents are relevant. (RP 320-321) The court rules that the checks were all relevant because of the charge of first degree theft. (RP 322) That the checks were all relevant to prove the aggravating factors charged. (RP 322)

The defense argued that the states aggravating factors allegation that Mr. Welch used his "position of trust, confidence, or fiduciary responsibility to

facilitate the commission of the offense” citing to 9.94A.535(2)(n) is the only allegation contained in the information. The state was maintaining that by filing a “Notice of Intent to Seek Sentence Above the Standard Sentencing Range” (CP 30-31) they avoided a need to file allegations by way of the Information. (CP 01-05)(RP 323) The court acknowledged that this issue has been raised by defense counsel earlier questioning the proper way to bring charges of aggravating factors. (RP 324 lines 5-17)

The prosecution stated that they would be resting. (RP 325 lines 1-5) The defense brought a motion regarding the charges of aggravating factors. (RP 325) In count 1 of the Information filed September 4, 2008 the state alleges one aggravating factor: “the position of trust, confidence, and fiduciary responsibility.” (RP 325 lines 9-12) September 16, 2009 the state filed a “Notice of Intent to Seek a Sentence Above the Standard Sentencing Range.” (CP 30-31) The notice alleges multiple victims or multiple incidents per victim, current offense involved substantially greater monetary loss substantially greater than typical for the offense, and the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time. (RP 325) The prosecutor has failed to amend the information to bring the additional facts or to have Mr. Welch arraigned on these facts. (RP 326 lines 1-9) The defense argued a failure of notice pursuant to *Blakely*, *Jones*, and *Apprendi* for not charging and arraigning on these additional aggravating factors. (RP 326-327)

The defense sought dismissal of these aggravating factors based upon the insufficiency of the evidence. (RP 327 lines 4-18) The defense moved for dismissal of all of the counts charged based upon insufficiency of the evidence. (RP 327 lines 15-23)

The defense explained that the state has failed to amend the information and to bring the additional charges. (RP 332) The state failed to bring the defendant into court and provide the information on the new allegations. (RP 332) The defense sought to strike the additional allegations on which Mr. Welch was never arraigned. (RP 333)

The court found sufficient evidence as to the forgeries to proceed to the jury. (RP 334-335) The same decision was reached to proceed to the jury with the First Degree Theft. All of this found considering the evidence in the light most favorable to the state. (RP 335)

In looking at the aggravating factors the court ruled that the failure to amend the information and add the additional aggravating factor precludes these additional aggravating factors from going to the jury. The failure to amend created prejudice to the defendant based upon notice. (RP 336) The court granted the defense motion as to aggravating factors not charged in the information. (RP 336-337) The court allowed the one aggravating factor violating the position of trust to go to the jury. (RP 339-340)

At the jury instruction conference the parties discussed the various instructions including the special verdict instructions. WPIC 160.00 was offered. The state proposed WPIC 300.50 “Did the defendant use a position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.” There were no instructions proposed by either party to explain in any fashion what was meant by position of trust, confidence, or fiduciary responsibility. (RP 365-366) The defense made no exceptions to the instructions as given by the court. (RP 366)

Prior to closing arguments on October 14, 2009, the defense renewed its motion for a mistrial and to exclude EX 48, the summary of the ledger. The defense pointed to testimony (RP 240-241) that EX 48 and EX 48A were only prepared in anticipation of this one trial. (RP 372-373) It is not a business record falling into a business record exception (RP 373), and violates *Crawford* and *Melendez-Diaz* cases. EX 49 is the business records of the checks written (RP 374), while EX 50 is the actual print out of the ledger which was 500 pages. (RP 374)

The state failed to bring the bookkeeper who prepared the summary that was admitted which denied the defendant’s right to cross examine under *Crawford*. It was pointed out that it is impossible to cross examine Mr. Hoffman who knew little about the records or their preparation. The bookkeeper was

needed to allow for an adequate opportunity to cross examine about the records.
(RP 377)

The court denied the motion for a mistrial based upon the denial of the right of confrontation ruling the exhibits were prepared in the regular course of business. (RP 382) The exhibits were held to be non-testimonial. (RP 382) The court read the instructions to the jury and provided no instruction to explain the meaning of the special verdict “a position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.” (RP 386-406) The court instructed in instruction 29 that all jurors must agree unanimously to find “no” as to the special verdict. (RP 404 lines 5-10)

In closing argument the prosecution misstated the evidence stating there were records of the company made within two months after Roy Welch left and that Jennifer Payton “testified several times”. The defense objected (RP 444-445), and stated that was not correct. The court both times denied the objections stating this was argument. (RP 444-445) The defense was later allowed the opportunity to renew the objection explaining that the prosecutor used EX 48 stating that “Jennifer Payton testified several times”. Further, that he mischaracterized when EX 48 was created making the error in admitting that document much more damaging. (RP 456-457)

On October 14, 2009 the jury returned a verdict of guilty of First Degree Theft Count 1, not guilty of Forgery in Count 2, not guilty of Forgery in Count 3,

guilty of Forgery in Count 4, guilty of Forgery in Count 5, guilty of Forgery in Count 6, and yes to the special verdict as to use of position of trust. (RP 470-474)

On November 18, 2009 the defendant appeared for a sentencing hearing. The state sought an exceptional sentence of 60 months based upon an “extreme violation of trust.” (RP 497 lines 6-10) Also the state sought this sentence based upon the quantities of money, length of time for offense to be carried out, and the emotional and financial damage to the Hoffman family. (RP 497 lines 11-16) The defense sought the first time offender option and argued this was all the same course of criminal conduct. (RP 500)

The court imposed a sentence and acknowledged that he was eligible for first time offender option. But the court noted that the jury found an aggravating factor of abuse of trust or fiduciary duty which the court indicates it must consider in giving the first time offender option. (RP 501) Next, the court indicated it would consider the “period of time” over which the crime occurred (a dismissed aggravating factor). (RP 502) The court declines then to give the first time offender option. (RP 502)

The court notes that he refused to let the state go forward with other aggravating factors. (RP 502-503) The court finds that the jury decision requires the court to consider the aggravating factor or “charged to look at that.” (RP 503 lines 14-17) The court then discusses what is an appropriate sentence beyond the standard range. (RP 503 lines 18-22) The court postulates that he could with the

enhancement impose the maximum of 120 months. The court considers the size of the embezzlement compared to others in the three counties where the court hears cases. (RP 504 lines 4-13) The court looks at the “devastation to the business, devastation to the Hoffman family, and the betrayal of the trust given to Mr. Welch.” (RP 504) After stating these considerations the court imposes 60 months as requested by the state.

A restitution hearing was held and the defense filed a brief regarding restitution addressing arguments on what amounts restitution could be sought based upon. (CP 82-84) (RP 514 lines 6-12)

The defense argued that restitution was proper only as to the charged counts both verbally and by restitution memorandum. (CP 82-84) (RP 514-515) The prosecution argues that they should be given restitution based upon all 40 checks based upon EX 48A. The state cites to 9.94A.750(6) and argues that the court may impose up to double the actual loss. (RP 519) The prosecutor alleges \$42,319.32 based upon the jury verdict relying on EX 48A. (RP 522 lines 1-12) The court postulates based upon the jury finding of guilty to Theft in the First Degree (RP 523 lines 7-20) and restitution based on EX 48A totals from column 2 are \$43,219.33. (RP 524)

The court recognizes that the defense argument that not all of the charges were proven or are uncharged crimes and *State v. Dauenhauer* 103 Wn. App. 373, 12 P.3d 661(2000) (RP 526) In *Dauenhauer* the appellate court vacated a

restitution order based upon uncharged conduct. The court then states that summary used in the trial which list the checks is how Mr. Enzler comes to his figure is something reasonably ascertainable. (RP 526-527) All of these amounts were included in the First Degree Theft charge. (RP 528)

Ultimately, the court orders \$43,219 restitution based upon the allegations in the First Degree Theft. (RP 532) (CP 82-84) The order refers to the oral record for the basis for the amount of restitution ordered. (CP 82-84 and RP 535) The defendant timely filed this appeal.

IV. ARGUMENT

Mr. Roy Welch was convicted of First Degree Theft and three counts of Forgery all without any opportunity to confront his accuser in violation of the 6th Amendment to the Constitution. The state was allowed to use a summary prepared by a bookkeeper who never appeared based upon a business record exception to the hearsay requirement.

The prosecutor then capitalized further upon these errors by telling the jury in closing that the bookkeeper testified at the trial (RP 444-445) and that EX 48 was prepared within two months of Roy Welch leaving the company. (RP 444-445) The court overruled a timely objection ruling this was argument. Later, the court relies extensively on this same exhibit to justify the restitution of \$43,219. (RP 524-534)

The court failed to instruct the jury on the definition of the aggravating factor and incorrectly instructed on the requirements to convict on the aggravating factors. The errors which occurred in this case require a remand for a new trial or remand for resentencing.

Issue 1: Whether the trial court erred in admitting EX 48 over a defense objection that the summary was hearsay evidence violating the defendant's sixth amendment right of confrontation.

The prosecution sought to admit a document prepared by a bookkeeper, Jennifer Payton, to summarize the allegations against Mr. Roy Welch. The exhibit as initially offered and prepared was EX 48A and it ultimately went to the jury as redacted EX 48. The court explains the designation of these exhibits during the trial. (RP 209 lines 1-11) Prior to jury selection the defense advised the court and prosecution of concerns about introducing evidence without bringing the person that prepared the documents under *Melendez-Diaz*. (RP 22-24)

During the trial the prosecutor attempted to have Mr. Paul Hoffman use a summary to "refresh his memory". The defense objected that the summary was (1) prepared by a bookkeeper, Jennifer Payton (RP 107), (2) he did not know how it was prepared (RP 108), and (3) Mr. Hoffman never verified the information but trusted his bookkeeper. (RP 108 lines 9-20) The document is described from the upper right hand corner reading "checks forged in corporate account." (RP 111) EX 48A. The summary further reads: "I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct....to the best of

my knowledge Paul Hoffman Sr. date 6/10/08.” (RP 111) EX 48A Defense counsel objects to the introduction of summary as hearsay prepared by a bookkeeper in anticipation of trial signed by Mr. Hoffman who doesn’t know how to operate Quickbooks and did not prepare the summary. (RP 112 lines 13-20) The prosecutor maintained it was not hearsay but the court held it was hearsay. (RP 115) The defense argued the failure to call the bookkeeper denied the defense the opportunity to question her about the summary or entries and notes Mr. Hoffman had a pecuniary interest in the proceeding. (RP 118-119)

On October 13, 2009 the argument continued and defense renewed the objection that EX 48 was not a business record under RCW 5.45.020. Mr. Hoffman did not prepare the document, it was not prepared in the regular course of business (RP 240-241), or prepared at or near the time of the event, unable to testify as to the method or time of preparation or that it was sequential document. (RP 138) The defense maintained the record violates the right of confrontation required under *Crawford v. Washington*. (RP 142 lines 3-10) The defense also sought mistrial for late disclosure of the new documents. (RP 142 lines 7-21) The court indicated that the summary was a business record and would be admitted. (RP 145 lines 1-5) Also the court points out that the document is more of a narrative or a conclusion. (RP 145 lines 11-12) The court indicates that the conclusions can be redacted from the document. (RP 146 lines 1-5) Mr. Hoffman testified he knew virtually nothing about Quickbooks or his bookkeeper’ records.

(RP 159-168) The defense argued *Melendez-Diaz* required the bookkeeper testify because the document is not a business record but prepared for use in trial. (RP 180-181) RCW 5.45.020 addresses business records as evidence it specifically defines a business record.³

In applying the statute to this case Mr. Hoffman was not the person who prepared the document (RP 155), he did not know how it was accomplished (RP 108), he did not verify what was in the report (RP 108), it was not prepared in the normal course of business (RP 111) EX 48 and EX 48A, it is not a sequential document (EX 48 and 48A), and based upon the affidavit it was prepared in anticipation of trial (EX 48 and 48A). The document and the testimony demonstrated that the document admitted as EX 48 was not a business record under RCW 5.45.020.

A related issue raised by the defense was whether EX 48 could be admitted without violating the defendant's Sixth Amendment Right of Confrontation. The defense raised this issue repeatedly during trial. (RP 23-25, 138-142, 179-181) The defense maintained that because Mr. Hoffman lacked knowledge of the preparation of the documents that support EX 48 it was impossible to confront him about the preparation of the exhibit admitted to the

³ "A record of an act, condition, or event, so 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, or 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."

jury. (RP 107-108) Mr. Hoffman was not able to access Quickbooks according to Ms. Alby and relied upon the bookkeepers. (RP 282-284) Mr. Hoffman testified he had little knowledge of Quickbooks or if changes could be made in Quickbooks. (RP 164-166) Further, Mr. Hoffman testified that EX 48 had never been prepared in the course of business until this allegation was uncovered. (RP 240-241)

The Sixth Amendment prohibits the admission of testimonial hearsay statements in a criminal case without an opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004) There are three prerequisites before *Crawford* applies. First, the statements must be offered for the truth of the matter asserted, i.e. for a hearsay purpose. *In re Pers. Restraint of Theders*, 130 Wash. App. 422, 432-433, 123 P. 3d 489 (2005); *Crawford*, 54 U.S. at 50-51, 124 S. Ct. 1354 (noting that the Sixth Amendment applies to hearsay statements admitted in court.) Second, the statements must be testimonial, and third, the defendant must not have had an opportunity to cross-examine the declarant.

In the present case the trial court ruled that the information in EX 48 was hearsay. (RP 115, 121 lines 1-9, and 170 lines 1-12) The second requirement of the statement being testimonial and the *Crawford* court gave three examples of statements that are testimonial: (1) ex parte in-court testimony or its functional equivalent, i.e. affidavit, custodial examination, prior testimony that the defendant

was unable to cross-examine, or similar pretrial statements that the defendant would reasonable expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford* 541 U.S. at 51-52, 124 S. Ct. 1354 (2004) In the case before the court EX 48A was clearly prepared for trial. It is sworn to under penalty of perjury. (EX 48A) The testimony from Mr. Hoffman was that this document was prepared only one time and not regularly for business. (RP 240-241) The prosecution admitted that Jennifer Payton was the person that prepared the documents (RP 145 to 146 lines 1-13), and she was a bookkeeper. The evidence supports that document EX 48 was prepared for trial and therefore is testimonial; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use later at trial. *Crawford*, 541 U.S. at 51-52, 124 S. Ct. 1354 (2004) Again, the evidence demonstrates that Exhibit 48A was prepared in a way that a witness would reasonably believe it was to be used at trial.

Lastly, the appellate court should consider whether the error was harmless. When an error, such as improperly admitted hearsay evidence, deprives the defendant of the right to confrontation, the State must show the error was harmless beyond a reasonable doubt. *State v. Powell*, 125 Wash. 2d 244, 267, 893

P.2d 615 (1995) An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wash. 2d 793, 808, 96 P.3d 228 (2004)⁴

Once more in the Welch case, the primary evidence was the improperly admitted hearsay, EX 48A and it was prepared only for trial. Mr. Hoffman testified that EX 48 was never prepared other than this one time. (RP 240-241) The form of the document shows that it was prepared in the form of an oath to be used in legal proceedings. (EX48 and 48A)

First, the appellate court should find that the trial court improperly admitted EX 48 as a business record exception contrary to RCW 5.45.020. Secondly, that the trial court violated Mr. Welch's right of confrontation and that it was not harmless beyond a reasonable doubt. The appellate court should not find this error harmless beyond a reasonable doubt because the prosecution in closing arguments improperly argued that Jennifer Payton testified several times and that EX 48 was prepared within two months of Roy Welch leaving. (RP 444-

⁴ More recently the U.S. Supreme Court in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed 2d 314 (2009) ruled:

“Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6) But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman*, 318 U.S. 109 (1943), made that distinction clear. There we held that an accident report provided by a railroad company did not qualify as a business record because, although kept in the regular course of the railroads operations, it was “calculated for use essentially in court, not in the business.” *Id.*, at 114.7

445) The defense objected to these mischaracterizations but the trial court denied the objection and the defense advised the trial court this error created a greater error in improperly admitting EX 48. (RP 456-457) The harmless error analysis does not apply and the case should be remanded for a new trial.

Issue 2: Whether the trial court erred in failing to grant the defense motion for mistrial or continuance due to the state's late disclosure of evidence generated during the trial as EX 49 and 50.

“CrR 4.7 is a reciprocal discovery rule, with the prosecutor’s and defendant’s obligations being separately listed, and with other subsections of the rule encompassing additional and discretionary disclosures and matters not subject to disclosure also being carefully set out.”⁵

The state has a continuing duty to promptly disclose discoverable information. CrR 4.7(h)(2); *State v. Greift*, 141 Wn.2d 910, 919, 10 P.3d 390 (2000); *State v. Brush*, 32 Wn.App. 445, 455, 648 P.2d 897 (1982) Where previously undisclosed discovery is revealed during the State’s case-in-chief, a continuance can be an appropriate remedy. *Brush*, 32 Wn.App. at 456.⁶

Mr. Welch was, similarly, suddenly provided during the prosecutor’s case-in-chief with hundreds of pages of computer generated accounting records. The defense initially requested a mistrial. (RP 141-142 line 21) Failing at that the

⁵ *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988), quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (*West Pub’g Co. ed 1971*)

⁶ In *Brush* at 456 the court held that the prosecutor’s noncompliance was not prejudicial error because the defense counsel failed to ask for a continuance.

defense requested a continuance to consult with an expert to evaluate and prepare for these records. (RP 151) The state did not agree to the continuance but “preferred that to the alternative of excluding the evidence.” (RP 151 lines 19-22) The court then denied the defense request for the continuance. (RP 152 lines 15-20) The defense later renewed the motion for a continuance which the court denied. (RP 182)

Mr. Welch was denied an opportunity to consult with an expert or to have the newly disclosed evidence reviewed by an accountant. The defense requested a continuance to review the records and consult with an expert to evaluate and prepare for the records. Where actual prejudice is shown to the defendant, reversible error has occurred. *State v. Oughton*, 26 Wn.App. 74, 79, 612 P.2d 812 (1980) citing *State v. Eller*, 84 Wash.2d 90, 95, 524 P.2d 242 (1974) The proper remedy where due process has been denied a defendant by not allowing time to prepare for new evidence is a new trial.

Issue 3: Whether the trial court committed reversible error by incorrectly instructing the jury on the aggravating factors requiring vacating of the enhancement.

The prosecution brought by way of information an aggravating factor that “the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” (CP 02) In instructions to the jury the court never gave any instructions explaining the meaning of the

aggravating factor. (CP 41-55) (RP 386-406) The defense and the prosecution both made no exceptions to the instructions given by the court. (RP 366)

The defense maintains that the courts instructions on the aggravating factor were constitutionally deficient. The legislature has established criteria regarding the procedure for imposition of a sentence above the standard range passed to bring the sentencing procedures into conformity with *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) RCW 9.94A.537. “The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” RCW 9.94A.537(3) The instructions lacked any articulation of the specific elements of each factor. (CP 41-55) (RP 386-406) A challenged instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995)

The factor at issue here is listed in RCW 9.94A.535(3), which provides a list of aggravating circumstances to be considered by a jury that will support a sentence above the standard range. The particular factor listed in RCW 9.94A.535(3)(d) is the offense a “major economic offense or series of offenses.” In RCW 9.94A.535(3)(d)(i-iv) four factors may identify an offense as a “major economic offense or series of offenses.”

The court only provided a verdict form for the question which read as follows: “Did the defendant use a position of trust, confidence, or fiduciary

responsibility to facilitate the commission of the crime?” (RP 471-472) (CP 41-55 and 40) In this case the state failed in the information to allege any of the other factors listed in RCW 9.94A.535(3)(d)(i-iii), and the court refused to allow any allegations not included in the information to proceed to the jury. (RP 336-340) Additionally, the special verdict form required that all the jurors be unanimous for the jury to find the answer of no. (RP 404 lines 5-10) (CP 41-55)

As the defense failed to object to the courts instructions or propose additional instructions the court must determine if the claimed error is of constitutional magnitude. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)

A failure to adequately instruct the jury on the elements of an aggravating factor for an exceptional sentence is manifest error affecting a constitutional right that may be argued for the first time on appeal. RAP 2.5(a); *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (a trial court’s failure to correctly, accurately, and completely convey the necessary legal standard in its jury instructions is an error of constitutional magnitude that is presumed prejudicial), abrogated on other grounds by *State v. O’Hara*, 167 Wn.2d 91, 217 P. 3d 756 (2009); *Williams*, 136 Wn. App. 486, 492-493, 150 P.3d 111 (2007)

The error must also be manifest. *O’Hara*, 217 P.3d at 760 (2009) Manifest in RAP 2.5(a)(3) requires a showing of actual prejudice. *O’Hara*, 217 P.3d at 760; *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) Here actual prejudice

is demonstrated by the failure to provide any definition of the element. The jury was provided no complete instruction to explain the context of the violation of the position of trust given in RCW 9.94A.535(3)(d)(i-iv) Then this error was further complicated where the court required a unanimous verdict to return a “no” verdict. (RP 404 lines 5-10)⁷ Division I of the Court of Appeals recently ruled in *State v. Gordon* 153 Wn.App. 516, 223 P.3d 519 (2009) that the failure to instruct on an element as an aggravating factor required remand for further proceedings as manifest error of constitutional magnitude.

A related question that must be considered is pursuant to RCW 9.94A.535(3)(d) the aggravating circumstance is “a major economic offense or series of offenses”. The statute then sets out in RCW 9.94A.535(3)(d)(i-iv) four factors that will “identify” “a major economic offense or series of offenses”. The jury was never instructed on “a major economic offense” and there was no findings by the jury except to RCW 9.94A.535(3)(d)(iv). The jury failed to make any factual finding that would allow the court to sentence Mr. Welch to an exceptional sentence pursuant to RCW 9.94A.535(3).

It is the defense position that the failure of the court to define either a “major economic offense or series of offenses” or the meaning of violation a position of trust in RCW 9.94A.535(3)(d)(iv) requires the dismissal of the

⁷ The Washington State Supreme Court held, in another Stevens County case, that the use of the instruction requiring unanimity in a special verdict was an error requiring vacating of the enhancement. *State v. Bashaw*, (Supreme Court Docket No. 81633-6 July 07, 2010)

enhancement. Alternatively, the giving of an instruction requiring unanimity on the enhancement for a finding of no requires the dismissal of the enhancement.

Issue 4: Whether the court erred in sentencing the defendant to a sentence enhancement pursuant to RCW 9.94A.535(3)(d) without the jury making a finding regarding a “major economic offense or series of offenses”.

RCW 9.94A.535 establishes the basis whereby a court may depart from the sentencing guidelines. Aggravating circumstances which are “exclusive list of factors that can support a sentence above the standard range” to be determined by procedure specified in RCW 9.94A.537. RCW 9.94A.535(3) subsections (a) to (aa) set out the factors which are aggravating factors. In some of these aggravating factors the legislature establishes factors that can be considered by the jury to determine if an aggravating factor is present.

In the Welch case the jury never determined whether the facts established a “major economic offense or series of offenses”. The jury determined only that: “The defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” (CP 40)(CP 96-98) (RP 471-472) Pursuant to RCW 9.94A.535(3)(d) it appears that for the court to sentence to an exceptional sentence the jury must make a finding that there was a “major economic offense or series of offenses”.

In evaluating this question of sufficiency of the evidence the court must first interpret the criminal sentencing statute established in RCW 9.94A.535(3).

Does the statute establish that the aggravating factor is a “major economic offense or series of offenses” or is the aggravating offense any of the sub-factors set forth in RCW 9.94A.535(d)(i-iv) In interpreting criminal statutes where the statute is ambiguous the court must apply the rule of lenity. *In re Post Sentencing Review of Charles*, 135 Wash. 2d 239, 249, 955 P.2d 798 (1998) Statutory interpretation involves question of law that is reviewed de novo. *Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1, 9, 43 P.3d 4 (2002) In construing the statute, the court’s objective is to determine the legislatures intent. *Id.* “[I]f the statute’s meaning is plain on its face, then the court must give effect to the plain meaning as an expression of legislature intent.” *Id.* at 9-10, 43 P.3d 4 The “plain meaning” of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wash. 2d 637, 645, 62 P.3d 462 (2003); *Campbell & Gwinn*, 146 Wash. 2d at 10-12, 43 P.3d 4 If after that examination, the provision is still subject to more than one reasonable interpretation, it is ambiguous. *Id.* If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary. *In re Post Sentencing Review of Charles*, 135 Wash. 2d 239, 249, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wash. 2d 576, 585, 817 P.2d 855 (1991)

In applying these criteria to RCW 9.94A.535(3) the jury must be requested to find that the crime was “a major economic offense or series of offenses”. The statute then sets out various different facts that they jury may use to make this determination of “major economic offense or series of offenses” that constitute an aggravating factor. Where as here the jury was not requested to find a “major economic offense or series of offenses” the court may only impose a standard range sentence. As there was an insufficiency of the evidence the case must be remanded and the sentence imposed without the enhancement.

Issue 5: Whether the trial court committed reversible error by making conclusions of law beyond those allowed by the jury’s findings of fact in imposing an exceptional sentence.

The trial court may only use as a factual basis for an exceptional sentence those facts that are submitted to a jury and proven beyond a reasonable doubt. *State v. Pillatos*, 159 Wash.2d 459, 150 P.3d 1130 (2007) The trial court is not to be left to draw any inferences from the facts in determining the existence of an aggravating factor. *State v. Flores*, 164 Wn.2d 1, 186 P.3d 1038 at 47-48 (2008) The jury in this case only found that: “The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” The jury never found a “major economic offense” or any degree of sophistication in embezzling business funds. (CP 96-98) The jury never found any ongoing betrayal of the owner or the owner’s family contrary to the courts’ conclusion of laws. (CP 96-98) Additionally, the jury never made any findings

comparing this allegation against any other allegation in the jurisdiction. (CP 96-98)

Here, the jury made a finding of “using a position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” The State Supreme Court deliberated in a similar case where a defendant pled guilty and stipulated that there were multiple incidents per victim which the trial court used to impose an exceptional sentence for a major economic offense. The sentence was imposed but reversed because there was not a stipulation that the crime constituted a major economic offense. *State v. Hagar*, 158 Wn.2d 369, 374, 144 P.3d 298 (Wash.2006)

In the Welch case the jury similarly deliberated finding only that Mr. Welch “used his position of trust” but never found a major economic offense. Similarly, the jury made no factual findings to support the other conclusions of law found by the court in section D. (CP 98) As such the case must be remanded for sentencing within the standard range.

Issue 6: Whether the trial court erred in imposing restitution for uncharged offenses and in amounts unproven at trial.

The trial court at the restitution hearing utilized EX 48A, which was the original document prepared by the bookkeeper. Once more that EX 48A was redacted to go to the jury as EX 48. The prosecution referred the trial court to the document. (RP 516-517) The prosecution maintained that all of these checks were

part of the first degree theft charge. (RP 516 lines 20-22) The trial court then used EX 48A to determine the amounts shown on that document were “reasonably ascertainable”. (RP 526-527) The court refers again to this exhibit arriving at \$51,319 which the prosecutor then explains he is requesting \$51,465.10. (RP 529-530) Ultimately the court orders a \$43,219 figure. (RP 532) It is important to note that EX 48A was the document introduced at trial over defense objection as hearsay and entered in violation of *Crawford* and the business record exception. (See earlier arguments.) (RP 171-185)

Restitution in Washington State is controlled by RCW 9.94A.753. The statute states restitution is based on “easily ascertainable damages for injury or loss to property....The amount of restitution shall not exceed double the amount of the offender’s gain or the victims’ loss from the commission of the crime.” There must be a causal relationship between the crime charged and proved and the victim’s damages for restitution to be ordered. *State v. Dauenhauer*, 103 Wn. App. 373, 378, 12 P.3d 661 (2000) A “but for” analysis determines whether a crime is causally connected to the charged and convicted crimes. *State v. Tobin*, 161 Wn.2d 517, 166 P.3d 1167, 1170 (2007) (citing *State v. Kinneman*, 155 Wash.2d 272, 268-288, 119 P.3d 350 (2005) A defendant cannot be required to pay restitution beyond the crimes charged absent a guilty plea with an express agreement that the defendant will pay restitution for crimes which he was not convicted. *Dauenhauer*, 103 Wn. App. at 378. Furthermore, restitution cannot be

ordered for acts “based upon the defendant’s ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” Id.

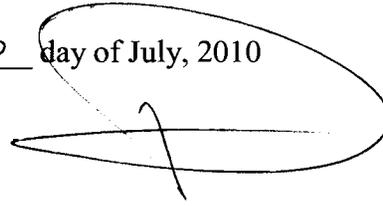
Mr. Welch’s case is substantially similar to the situation in *Dauenhauer*. Mr. Welch was convicted of only three of five forgery counts. Yet the prosecution sought restitution for uncharged forgery counts by maintaining that the uncharged forgeries were part of a first degree theft. The prosecution argued that the theft in the first degree was an “ongoing theft that took place between February, 2006 and March, 2007” and was all part of the criminal conduct alleged in count 1. (RP 520 lines 9-13)

The court ordering restitution for these uncharged forgery counts requires that the appellate court consistent with prior rulings in *State v. Dauenhauer* 103 Wn. App. 373, 378, 12 P.3d 661 (2000) remand the case for calculation of the restitution based upon the forgeries for which the jury returned convictions.

V. CONCLUSION

The defense requests that the court remand this case for a new trial based upon the various errors committed by the trial court. Remand is required by the discovery violation and the courts refusal to grant a continuance. Alternatively, the denial of the defendant’s Right of Confrontation requires a new trial. Alternatively, the case should be remanded for resentencing without any sentencing enhancement due to the errors in instructing the jury.

Respectfully submitted this 13 day of July, 2010

A handwritten signature in black ink, consisting of a large, stylized loop that crosses itself, positioned above a horizontal line.

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COURT OF APPEALS
DIVISION III
SPOKANE, WA

**COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON)	
Respondent)	Cause No. 28619-3
)	Cause No. 08-1-00218-1
vs.)	
)	
ROY A. WELCH)	DECLARATION OF
Appellant)	SERVICE
_____)	
)	
)	

I, Leah M. Hill, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a legal assistant in the office of Phelps & Associates, PS, served in the manner indicated below, an original and one copy of the Brief of Appellant, on July 14, 2010.

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I further declare that I served in the manner indicated below a true and correct copy of the Brief of Appellant, on July 14, 2010.

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

Signed at Spokane, WA on this 14 day of July, 2010



LEAH M. HILL