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COURT OF APPEALS
DIVISION III
CLERK OF COURT

COA No. 30232-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT LEE WIDRIG, Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

A. The State's evidence was insufficient to support Robert Lee Widrig's convictions.....1

B. The court erred by denying Mr. Widrig's motion for mistrial.....1

Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt? (Assignment of Error A).....1

2. Did the court err by denying Mr. Widrig's motion for mistrial based on the jurors' use of extraneous evidence? (Assignment of Error B).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....7

A. The evidence was insufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt.....10

B. The court erred by denying the motion for mistrial based on the jurors' use of extraneous evidence.....12

IV. CONCLUSION..... 15

TABLE OF AUTHORITIES

Table of Cases

State v. Balisok, 123 Wn.2d 114, 866 P.2d 631 (1994).....13

<i>State v. Boling</i> , 131 Wn. App. 329, 127 P.3d 740, review denied, 158 Wn.2d 1011 (2006).....	12
<i>State v. Briggs</i> , 55 Wn. App. 44, 776 P2d 1347 (1989).....	13, 15
<i>State v. Fry</i> , 153 Wn. App. 235, 220 P.3d 1245 (2009), review denied, 168 Wn.2d 1025 (2010).....	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972).....	11
<i>State v. Jackman</i> , 113 Wn.2d 772, 783 P.2d 580 (1986).....	13, 14
<i>State v. Quismundo</i> , 164 Wn.2d 499, 192 P.3d 342 (2008).....	14
<i>State v. Stevenson</i> , 128 Wn. App. 179, 114 P.3d 699 (2005).....	11

I. ASSIGNMENTS OF ERROR

A. The State's evidence was insufficient to support Robert Lee Widrig's convictions.

B. The court erred by denying Mr. Widrig's motion for mistrial.

Issues Pertaining to Assignments of Error

1. Was the evidence sufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt? (Assignment of Error A).

2. Did the court err by denying Mr. Widrig's motion for mistrial based on the jurors' use of extraneous evidence? (Assignment of Error B).

II. STATEMENT OF THE CASE

Mr. Widrig was charged by amended information with one count of residential burglary, one count of second degree theft, and 12 counts of second degree animal cruelty. (CP 78). The case proceeded to jury trial.

Katrina Riexinger was married to Mr. Widrig from July 5, 1978, to September 15, 2008. (5/10/11 RP 50). She had filed for divorce on January 7, 2007. (*Id.*). They had four boys together. (*Id.* at 51). Mr. Widrig worked backhoe in heavy equipment

construction. (*Id.* at 51). She filed because he abandoned the family. (*Id.* at 52).

In fall 2005, Mr. Widrig left home to work in Las Vegas with her blessing as the money was very good. (5/10/11 RP at 53-54). That was the last time he regularly lived in the Cle Elum house. (*Id.* at 53). He would come back for 3-4 day visits and fly back to Las Vegas. (*Id.*). They had moved from North Bend to Cle Elum in 1992. (*Id.* at 55). Eventually, Mr. Widrig stopped calling. (*Id.* at 54). He later admitted to Ms. Riexinger that he had taken up with a bad crowd. (*Id.* at 55).

She had full custody of their sons, three of whom were then adults. (5/10/11 RP 56). Mr. Widrig's child support obligation was \$768/month. (*Id.*). He owed about \$50,000 in back child support. (*Id.*). He had given jewelry to Ms. Riexinger from their high school days until she filed for divorce. (*Id.* at 57). But she had no desire to wear it anymore. (*Id.*). She put her wedding ring, earrings, and necklace he bought her into a ziplock bag that she kept in an upstairs drawer. (*Id.* at 57-58). She did not give any of this jewelry to Ivalee Widrig, her former mother-in-law. (*Id.* at 58). As for Ms. Riexinger's wedding ring and anniversary band, she did not give them to anyone at any time. (5/10/11 RP 98).

Ms. Riexinger had other jewelry she kept in a jewelry box on her dining room table. (5/10/11 RP 57, 59). The box was right by the back door to the home. (*Id.* at 59). She had been awarded the Cle Elum house in the divorce, while Mr. Widrig got all the tools in the basement along with a china hutch, his family shotgun, and a snowmobile. (*Id.* at 57).

Mr. Widrig was in Las Vegas from fall 2005 until spring 2007, when he moved back to North Bend. (5/10/11 RP 60). He had been to the Cle Elum house for a weekend visit on Ms. Riexinger's birthday in February 2006. (*Id.* at 61). He also visited on Father's Day at the end of May or the beginning of June 2006. (*Id.*). She saw him in Las Vegas in August 2006. (*Id.*). In spring 2007, Mr. Widrig got some tools from the Cle Elum house. (*Id.*). She saw everything he loaded into his small pickup. (*Id.* at 62). It was full of stuff, but there no jewelry. (*Id.*). The next time she saw Mr. Widrig was in court on the dissolution. (*Id.* at 63). Spousal maintenance was set at \$500/month. (*Id.*).

Mr. Widrig gave her a list of items he wanted from the house and he was to pick them up by October 15, 2008. (5/10/11 RP 66). He did not get the items by that date. (*Id.*). At the end of

September 2008, he set up an appointment to pick them up, but he cancelled. (*Id.* at 67-68).

Ms. Riexinger went on vacation with her sons to Disneyland from October 5 to October 13, 2008. (5/10/11 RP 68). Her parents offered to watch the house and feed the animals. (*Id.*). She and her son River had 12 show rabbits. (*Id.* at 69). The morning of October 10, Ms. Riexinger got a frantic call from her mother that the rabbits were gone. (*Id.* at 69-70). She told her mother to call 911 and get the police up there. (*Id.* at 70). Ms. Riexinger cut short the vacation and drove home, arriving on October 13. (*Id.* at 71).

She inspected the house and saw the window in the family room looked like it had been propped up. (5/10/11 RP 71). The ladder along the fence had been moved. (*Id.*). This was significant to her because the sliding glass door in her second floor bedroom did not lock and someone could just slide it open. (*Id.* at 72). The items that were missing were a new Coleman lantern, the ziplock bag with the jewelry from Mr. Widrig, her son's laptop, and the rabbits. (*Id.* at 73-74). Other items, including flat screen TVs, DVDs, video games and systems, the jewelry box on the dining room table, were not taken. (*Id.* at 75-76). Ms. Riexinger had homeowner's insurance and the property was valued at around

\$14,000. (*Id.* at 74). With a \$2000 deductible, she received about \$12,000. (*Id.*).

As for the rabbits, Ms. Riexinger and the boys raised show rabbits as a hobby. (5/10/11 RP 76). They were Netherlands pedigree show rabbits that she and the boys had raised since 1998. (*Id.*). At the time of the incident, they had 12 rabbits, who were housed in condo units in a cedar shed 60 feet away from the home. (*Id.* at 77). The condo units were individual cages with their own cases and trays, drop pans, drawers, and food hoppers. (*Id.*). These rabbits were a fancy breed and did not run around. (*Id.*). They were strictly for show. (*Id.* at 77-78).

Mr. Widrig built the rabbit shed. (5/10/11 RP 78). When it got cold, Ms. Riexinger put a heat lamp on the rabbits. (*Id.*). But whether it was a heat lamp or a regular light bulb, they were on 24/7. (*Id.* at 79). The power comes from an underground cord with the plug-in next to the basement door. (*Id.*).

When Ms. Riexinger and the boys arrived home on October 13, her brother and father had captured 7 of the 12 rabbits. (5/10/11 RP 81). They were very stressed. (*Id.*). Being show rabbits, they do not run around and forage and will not even jump out of their cages. (*Id.* at 82). Someone would have to reach in

and physically carry them from the cages. (*Id.*). Three rabbits were never recovered. (*Id.*). Two that were found had been injured and died, one with a broken back and the other tortured by dogs. (*Id.* at 82, 86). River said all the rabbits were scared, skinny, and starved. (*Id.* at 123).

Kevin Opdahl, an Auburn pawn shop owner, testified two rings were brought in by Tamara Lynn Rowland on November 24, 2008. (5/10/11 RP 130). The pawn contract indicated a transaction for those two rings. (*Id.*).

Mr. Widrig had been Ms. Rowland's boyfriend for four years. (5/10/11 RP 138). They met at the Flamingo Hilton in Las Vegas. (*Id.* at 139). They did not live together there, but they did in North Bend, where she moved around June 2007. (*Id.*). At trial, she identified the pawn contract and the rings she pawned. (*Id.* at 140). Mr. Widrig drove her to the pawn shop. (*Id.* at 140-41). His mother gave the rings to Mr. Widrig and told him to just pawn them for money. (*Id.* at 141). They were in a box he got from Ms. Riexinger. (*Id.* at 143). The whole box was in the car when they went to the pawn shop. (*Id.* at 145).

Ms. Rowland agreed to pawn the rings because Mr. Widrig forgot his ID. (5/10/11 RP 145-46). On the pawn ticket, Mr. Widrig

put down an address she thought was his mother's in North Bend, but it turned out not to be. (*Id.* at 147). He had been out of work about 4-5 months and was sad. (*Id.* at 156-57). Ms. Rowland said he did not harm the animals. (*Id.* at 158). His mother had the rings before they even got to North Bend. (*Id.* at 159).

Ivalee, Robert Widrig's mother, lived at 11834 – 434th Ave. SE in North Bend, Washington. (5/11/11 RP 169). She remembered having a telephone conversation with a female officer in October 2008, but recalled nothing of it. (*Id.* at 170, 176). Ms. Widrig had in her possession the wedding and engagement rings. (*Id.* at 184). She got the rings right after her son had come back from Las Vegas and had gone to pick up some of his belongings in Cle Elum. (*Id.* at 185). Robert gave the rings to her to keep. (*Id.* at 193).

Cle Elum police officer Jennifer Rogers responded to the burglary report at 113 W. 6th on October 10, 2008, at Ms. Riexinger's house. (5/11/11 RP 218, 221). Folks were trying to capture the rabbits. (*Id.* at 222). One rabbit was shaking uncontrollably and another had a broken back. (*Id.* at 223). A laptop was missing and the upper bedroom was open. (*Id.* at 224). There were no broken windows or locks. (*Id.* at 224). Fingerprints

were taken from a south-facing window to the dining room on the middle floor. (*Id.* at 226-27). They were negative in comparisons to Mr. Widrig and Ms. Rowland. (*Id.* at 228).

Shortly after Officer Rogers returned to the station after getting done going through the home with Ms. Riexinger's mother, she got a call from the dispatch agency for Kittitas County that Mr. Widrig had phoned for a civil standby so he could pick things up from the Cle Elum house. (5/11/11 RP 229). The officer called him back and advised him she had just responded to a burglary at his former residence and she considered him a suspect. (*Id.* at 231). When asked where he had been in the last 24 hours, he said he had been in North Bend the entire time. (*Id.* at 232). Mr. Widrig said he had no problems with his ex-wife. (*Id.* at 233).

He asked the officer if she wanted to talk with his mother as she could vouch for his being in North Bend. (*Id.* at 234-35). His mother got on the phone. (*Id.* at 235). She said her son had been home. (*Id.* at 262).

Officer Rogers recovered Ms. Riexinger's wedding ring and anniversary band. (5/11/11 RP 245). She had received a pawn hit from King County that they had been pawned by Ms. Rowland in

Auburn. (*Id.* at 246). The officer got the rings in the mail from the pawn shop. (*Id.* at 247).

June Holt, the officer manager and accountant for Webber Construction, testified Mr. Widrig had been working from 7 a.m. to 3 p.m. on October 9, 2008, and from 6:30 a.m. to 1:30 p.m. on October 10, 2008, at a North Bend job site. (5/11/11 RP 278, 282).

There were no exceptions or objections to the court's instructions. (5/11/11 RP 320). The jury found Mr. Widrig guilty of all counts. (*Id.* at 369; CP 151, 152, 153-164).

Subsequent to the jury verdict, the court sent a letter on May 12, 2011, to counsel informing them of a possible problem concerning the jury:

After court adjourned last night I left the bench, went to chambers and removed my robe, then proceeded into the jury room to help the bailiff clean up the room. Upon entering the jury room I immediately noticed a book on the table, Washington Court Rules, Volume I – State. I asked the bailiff if he'd placed that book in the jury room and he said no, the book was there when he went in to clean up. At this point I am unaware of how or when that book was introduced into the jury room. I placed my initials and the date (5/11/11) in ink, on the book, and have it available for inspection at your convenience. I have reviewed *State v. Fry*, 153 Wn. App. 235 (2009) and am willing to call the jurors back to court, place them on the witness stand individually, place them under oath, and allow

you to ask each of them whatever questions you may have about this issue so that you may develop a record of what impact this book may have had upon their deliberations. (CP 166).

The court subsequently held a hearing where each juror was questioned about the book in the jury room. (5/23/11RP 378-419; 6/24/11 RP 424-26, 443-46). Mr. Widrig moved for a mistrial based on the jurors' use of extraneous evidence. (CP 173). The motion was denied. (CP 180; 6/24/11 RP 449).

The court sentenced Mr. Widrig to concurrent sentences of 17 months for residential burglary and 8 months for second degree theft on these felonies. As it can do, the court imposed consecutive sentences of 30 days each on two counts and 5 days each on the remaining 10 counts of second degree animal cruelty for a total of 110 days on these gross misdemeanors. (CP 191). This appeal follows.

III. ARGUMENT

A. The evidence was insufficient to support the convictions when the State failed to prove identity beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still failed to show by the requisite quantum of proof that Mr. Widrig was the person who committed the crimes. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The defense did not dispute that someone stole items from the Cle Elum home and someone let the rabbits out of their condo units and they were hurt. (5/11/11 RP 352-362). The question was who. No one saw Mr. Widrig at the home. The evidence was circumstantial at best. But he had an alibi backed up with documentary evidence from his employer and had plausible explanations for how he came to possess the wedding ring and anniversary band, corroborated by his mother.

Even though credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture by the jury. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In the circumstances here, the identity of the perpetrator of these crimes was not proven by facts in evidence, but was instead improperly based on guess, speculation, or conjecture. The State's evidence was simply insufficient to prove beyond a reasonable doubt that Mr. Widrig was

the person who committed the crimes. His convictions must be reversed.

B. The court erred by denying the motion for mistrial based on the jurors' use of extraneous evidence.

Mr. Widrig moved for a mistrial because several jurors perused the Washington Court Rules book that had been left in the jury room. (CP 173). Ten of the 12 jurors saw the book. (6/17/11 RP 385, 389, 391-92, 397, 400, 403, 409, 413; 6/24/11 RP 425, 444). Several jurors read or thumbed through it (6/17/11 RP 385, 390, 391-92, 399, 403,410, 414; 6/24/11 RP 444). One juror read the book during deliberations. (6/17/11 RP 394). Another heard one juror read aloud from the book before deliberations. (6/17/11 RP 398). A juror looked through the book searching for criminal law. (6/17/11 RP 403). Another read it looking for degrees of a criminal offense and discussed it with a juror next to or across from her.. (6/17/11 RP 417, 418).

A defendant is entitled to a new trial if a juror's use of extraneous evidence could influence the verdict and prejudice him. *State v. Boling*, 131 Wn. App. 329, 332, 127 P.3d 740, review denied, 158 Wn.2d 1011 (2006). On the other hand, the court may properly deny such a motion if it is satisfied beyond a reasonable

doubt the extrinsic evidence did not contribute to the verdict. *Id.* at 333. The court's decision is reviewed for an abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994).

The court need not delve into the actual effect of the evidence. *State v. Jackman*, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1986). Moreover, any doubts must be resolved against the verdict. *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

In its order denying the motion for mistrial, the court found, among other things, that the jurors who looked at the book said they did not understand what they read and no juror said the book was used or discussed during deliberations. (CP 181). To the contrary, the evidence was undisputed that (1) the presiding juror thumbed through the rule book and said nothing about whether she could understand its contents; (2) juror # 13 looked through the book and read it during deliberations; (3) juror # 4 looked for criminal law in the book and said nothing about whether he could understand its contents; and (4) juror # 12 read from the book trying to look up degrees of a criminal offense and said nothing about whether she could understand its contents. The evidence does not support the court's finding of fact 12 that "all of the jurors who attested that they looked at the book, attested they did not

understand what they read.” (CP 181). Juror # 13 read the book during deliberations so the evidence also does not support the court’s finding of fact 13 that “[n]ot one juror attested that the book was used or discussed during deliberations.”

From these erroneous findings unsupported by substantial evidence, the court concluded “the court is not convinced that jurors used the book during deliberations or that the mere presence of the book could influence the verdict and prejudice the defendant.” (CP 182). Yet, the undisputed evidence shows the rule book was indeed read during deliberations. (6/17/11 RP 394). The court determined the book was extraneous evidence. (CP 181). That evidence was used during deliberations by at least one juror. (6/17/11 RP 394). The court then gratuitously considered the possible effect of that evidence. (CP 182). This, it need not do. *Jackman*, 113 Wn.2d at 777-78. The court then compounded the error by failing to resolve any doubts against the verdict. *Briggs*, 55 Wn. App. at 55. In denying a mistrial, the court abused its discretion as the decision rested on facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

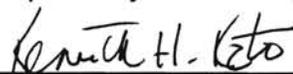
In light of the undisputed evidence in the record that the rule book was used by jurors to look up criminal law and degrees of offenses, the subject of the case before them, and one juror had read it during deliberations, there is reasonable doubt that the extraneous evidence did not influence the verdict and thus prejudice Mr. Widrig. *State v. Fry*, 153 Wn. App. 235, 239, 220 P.3d 1245 (2009), 168 Wn.2d 1025 (2010). Since all doubts must be resolved against the verdicts, the court erred by denying his motion for mistrial. *Briggs*, 55 Wn. App. at 55. Mr. Widrig is entitled to a new trial.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Widrig respectfully urges this court to reverse his convictions and dismiss the charges or remand for new trial.

DATED this 9th day of October, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 9, 2012, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Robert Lee Widrig, 11834 – 434th Ave. SE, North Bend, WA 98045; and Gregory L. Zempel, Kittitas County Prosecutor, 205 W. 5th Ave., Ste 213, Ellensburg, WA 98926-2887.

