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Court of Appeals
Division III
State of Washington

33828-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HUESTIES,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is a unanimity instruction required for alternative means where sufficient evidence supports each alternative means?
2. Was counsel's performance deficient for failing to object to Jury Instruction:

   - No.s 9 and 10 regarding the presumption of intent, where the Defendant clearly received both statutory and actual notice?

   - No. 12, the missing witness instruction, where only the Defendant knew the involvement and identity of Mr. Rodriguez (including his name, address, phone number, appearance, and mutual friends) and failed to share this information until he took the stand?

3. Was the prosecutor's closing argument proper in arguing the instructed and permissible inferences?

IV. STATEMENT OF THE CASE

The Defendant Jeffrey Huesties has been convicted by a jury of theft of rental property. CP 87.

On October 30, 2014, the Defendant rented a $1400 dehumidifier at Pasco Rentals in Pasco, Washington for a single day at a rate of $23/day. RP 21-23, 27-29, 34-35; PE 1. When he failed to return it, Pasco Rentals sent a certified letter to the address the Defendant had provided in his contract. RP 31. It was the Defendant's true address. RP 48. The post office attempted to deliver the letter three times. RP 31-32, 48. However, it was returned unclaimed. RP 31-32.

On November 19, Pasco Rentals left a message on the Defendant's cell phone. RP 28, 32-33, 48; PE 2. The Defendant called back the next day saying he would return the humidifier that day. RP 33, 44-45. But he never returned the dehumidifier and never contacted Pasco Rentals again. RP 33, 36, 46.

On November 21, a Pasco Rentals employee went to the

Defendant's house and met with the Defendant's mother. RP 33. She did not know where the property was. RP 33-34.

The Defendant testified at trial. He has been convicted of multiple felony crimes of dishonesty. CP 89. He was convicted of a crime of dishonesty as recently as 2011. RP 41. The Defendant claimed that the post office does not deliver his mail "because of the dogs outside." RP 47. He did not explain how the Pasco Rentals employee went to his house without any dog incident. Nor did he deny the telephone demand for return of property. RP 45.

Mr. Huesties testified that he had no intent to deprive Pasco Rentals of a dehumidifier, but had rented the property on behalf of an acquaintance Tony Rodriguez whom he believed would pay the rental fee and return the property in a couple days. RP 42-43.

He testified that he had met Mr. Rodriguez a month or so previously through a friend, but did not know Mr. Rodriguez's last name. RP 43-44, 46, 51. The Defendant claimed Mr. Rodriguez and this friend lived in the condos or apartment complex on 1816 West Sylvester in Pasco. RP 12, 44, 50, 84. However, he did not provide this address to his attorney until the month before trial. RP 59. And the attorney did not provide the address to the State until the morning of

trial. RP 9, 11-13.

Mid-trial, after Mr. Rodriguez's name and address had finally been disclosed to the State, police contacted the tenant and landlord on Sylvester Street. RP 83-84. The property had been in foreclosure at the time the Defendant claimed Mr. Rodriguez had been living in condos there. RP 74. The new owner had no knowledge of a Mr. Rodriguez. RP 84.

The Defendant testified that Mr. Rodriguez had once helped him to start his car which had been parked outside of Mr. Rodriguez's residence. RP 44. After this very short acquaintanceship, Mr. Rodriguez called the Defendant to ask him to enter into a rental agreement on Mr. Rodriguez's behalf to guarantee a $1400 dehumidifier. RP 28, 35, 42-43, 55. According to the Defendant, Mr. Rodriguez was a person who did not possess identification, and yet he was also a person who could afford and would consider renting a dehumidifier at $23/day to dry a carpet. RP 34, 42. Despite not knowing Mr. Rodriguez's last name and despite the problems with Mr. Rodriguez's story, the Defendant testified that he entered into a contract with Pasco Rentals assuming liability. RP 43-44, 46.

The Defendant claimed that long time family friends John and

Lisa were with him when Mr. Rodriguez called to ask this favor and when he rented the dehumidifier and delivered it to Mr. Rodriguez. RP 42-43, 50. When the prosecutor inquired how they could be reached, the Defendant testified that John was unavailable and Lisa was out of town. RP 62-63.

The Defendant testified Mr. Rodriguez intended to use the dehumidifier to dry a carpet in the few hours before his children arrived home that evening. RP 42. The Defendant had worked for Three Rivers Carpet Cleaning. RP 49. Under cross examination, he admitted he knew that the proper way to dry a carpet was with a blower or a fan. RP 53. He knew that a dehumidifier would not have dried the carpet. RP 53.

The Defendant claimed that when the rental company contacted him three weeks later to recover their property, he looked for Mr. Rodriguez. RP 44-45. He claimed that Mr. Rodriguez's phone had been disconnected. RP 45. He claimed that he went to Mr. Rodriguez's residence, only to learn that he had moved out. RP 45-46. After talking to the neighbors, the Defendant learned Mr. Rodriguez's last name for the first time, but apparently could not ascertain a forwarding address. RP 46. The Defendant made no further efforts to

assist the rental company in locating their property or in paying under the contract he had guaranteed. RP 46-47.

The jury was instructed:

Instruction No. 9

> You may presume intent to deprive if the person who rented or leased property failed to return or make arrangements acceptable to the owner of the property or the owner's agent to return the property to the owner or the owner's agent within seventy-two hours after receipt of proper notice following the due date of the rental, lease, lease-purchase, or loan agreement.

Instruction No. 10.

> "Proper notice" means a written demand by the owner of the owner's agent made after the due date of the rental, lease, lease-purchase, or loan period, mailed by certified or registered mail to the renter, lessee, or borrower at: (a) The address the renter, lessee, or borrower gave when the contract was made; or (b) the renter, lessee, or borrower's last known address if later furnished in writing by the renter, lessee, borrower, or the agent of the renter, lessee, or borrower.

....

Instruction No. 12

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
> (1) The witness is within the control of, or peculiarly available to, that party;

> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
> (5) The inference is reasonable in light of all the circumstances.

CP 48-49, 51.

Defense counsel averred that he had reviewed the jury instructions and had "no objections or exceptions." RP 80-81.

The jury did not find the Defendant's testimony credible, but found him guilty. CP 77.

V. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE THAT THE DEFENDANT WRONGFULLY OBTAINED THE PROPERTY.

The Defendant frames his first claim as a denial of his right to unanimous jury verdict. Appellant's Opening Brief (AOB) at 7. In fact, his true claim regards the sufficiency of the evidence for the alternative means of wrongfully obtaining property. Appellant's Opening Brief (AOB) at 12.

The right to a unanimous jury verdict includes the right for the jury to be unanimous as to which ***acts*** formed the basis of the crime, but not as to which alternative ***means***. *State v. Kitchen,* 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

> Unanimity is not required, however, as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means. *State v. Whitney,* 108 Wash.2d 506, 739 P.2d 1150 (1987); *State v. Franco, supra;* and *State v. Arndt,* 87 Wash.2d 374, 553 P.2d 1328 (1976). In reviewing an alternative means case, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt. *Franco,* 96 Wash.2d at 823, 639 P.2d 1320, citing *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

State v. Kitchen, 110 Wn.2d at 410-11. *State v. Linehan*, 147 Wn.2d 638, 648, 56 P.3d 542 (2002) ("Unanimity is not required if there is substantial evidence supporting each of these alternative means").

The question then is only whether there is ***sufficient evidence*** that the Defendant both wrongfully obtained and exerted unauthorized control over the rental property. CP 44, 45, 47.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll

reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

It was the State's position, as the defense acknowledges, that there was sufficient evidence of both means. AOB at 11; RP 97, 112 (prosecutor arguing both means in closing). The Defendant concedes the exertion of unauthorized control, and only challenges the evidence that he wrongfully obtained the rental property. AOB at 12.

Viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the evidence is that the Defendant obtained

the dehumidifier in order to dispose of it, not to use it. That is, he obtained it wrongfully.

It is plain that he did not obtain the dehumidifier for his own use. He admits that, and his mother had never seen it in the home. And he did not obtain the property for another's legitimate use. The explanation the Defendant provides is patently not credible. The Defendant has convictions for crimes of dishonesty. There is no part of his story that rings true.

The Defendant did not provide the generic "Rodriguez" name to his attorney until shortly before trial and to the prosecution the morning of trial when there was precious little time to investigate. When the officer did investigate in the middle of trial, he uncovered no evidence that "Rodriguez" had lived at the Sylvester address. Under the proper standard, interpreting all inferences for the state and against the Defendant, no one named Tony Rodriguez had lived at 1816 West Sylvester in Pasco in the relevant time period.

The Defendant said he did not know the person's last name and yet, when this vague acquaintance made a quick phone call, the Defendant wants us to believe that he dropped everything to guarantee and deliver $1400 in property for him. He claims "Rodriguez" did not

have ID and yet had money to waste on expensive equipment to do what time (in this desert climate) or towels could have accomplished for free. He claims the equipment was rented to do what he knew from professional experience that it could not do, i.e. dry out a carpet in a few hours. The Defendant did not know this person well enough to put himself at risk for this amount of money and on this implausible a story. Nor did he behave as a reasonable person would have after guaranteeing a suspicious rental. He did not check up on his $1400 risk the next day when the rental was due to be returned, or even within the three weeks before Pasco Rentals came calling. After the contact, he made no effort to assist Pasco Rentals in recovering their property or even to mitigate his own damages. He did not call police. Under the proper standard, interpreting all inferences for the state and against the Defendant, the Defendant did not rent the property on behalf of another person.

When Pasco Rentals tried to reach him, the post office left three messages regarding the certified letter, but the Defendant refused to claim it. He claimed the post office did not do what they said they did. It is not plausible that the post office would accept the price of a certified letter and not perform the work. It is not plausible that the post

office staff was afraid to approach his home when the Pasco Rental staff met with the Defendant's mother at the house without any trouble. Under the proper standard, interpreting all inferences for the state and against the Defendant, he was avoiding Pasco Rentals.

Interpreting all inferences under the correct standard, the Defendant's testimony was a fiction. A rational trier of fact could find beyond a reasonable doubt that the reason he lied and the reason he did not assist in tracking down "Rodriguez" is because he did not obtain the dehumidifier for a proper purpose.

B. DEFENSE COUNSEL'S PERFORMANCE WAS NOT DEFICIENT FOR FAILING TO OBJECT TO PROPER JURY INSTRUCTIONS.

The Defendant did not make any timely challenge to the giving of any jury instruction. On appeal, he challenges different instructions under a theory of ineffective assistance of counsel.

To prove ineffective assistance of counsel, the Defendant must show that his counsel's performance fell below an objective standard of reasonableness and that this deficiency prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland,* 127 Wn.2d 322, 334–35,

899 P.2d 1251 (1995). "Deficient performance is that which falls below an objective standard of reasonableness." *State v. Weaville,* 162 Wn.App. 801, 823, 256 P.3d 426 (2011). Counsel is presumed to be effective, and the Defendant bears the burden of showing an absence of legitimate strategic reasons supporting his counsel's challenged conduct. *McFarland,* 127 Wn.2d at 335, 899 P.2d 1251; *State v. Hendrickson,* 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996). Because he rests his claim of ineffective assistance of counsel on defense counsel's failure to object, he must show the trial court likely would have sustained an objection. *State v. Fortun-Cebada,* 158 Wn.App. 158, 172, 241 P.3d 800 (2010).

To demonstrate prejudice, the Defendant must show a reasonable probability that but for the deficient performance, the result of the trial would have been different. *In re Pers. Restraint of Crace,* 174 Wn.2d 835, 843, 280 P.3d 1102 (2012).

The Defendant argues that prejudice is a decided matter. AOB at 17. This is inaccurate. It can be prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). However, under controlling authority, even an instructional error in the to-convict

instruction is subject to a harmless error analysis. *State v. Jennings*, 111 Wn. App. 54, 62-64, 44 P.3d 1 (2002) (following *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 302 (1991). *See also State v. Montgomery*, 163 Wn.2d 577, 600, 183 P.3d 267 (2008). An error is harmless when it appears beyond a reasonable doubt that it did not contribute to the verdict obtained. *State v. Jennings*, 111 Wn. App. at 64.

Because the challenged instructions were properly given, counsel's performance was not deficient.

1. <u>It was proper to instruct the jury of the statutory presumption of intent to deprive where Defendant received proper notice of owner's demand for return of the rental property</u>.

The Defendant argues that his counsel's performance was deficient for agreeing to jury instructions No 9 and 10. Brief of Appellant at 15. The instructions quote RCW 9A.56.096(2) and (3).

Instruction No. 9 permits the jury to presume an intent to deprive if, within 72 hours of "receipt of proper notice," the Defendant failed to return the rental property or failed to make alternate arrangements with Pasco Rentals. CP 48. Instruction No. 10 defines "proper notice" as certified mail sent to the renter's address provided

in the rental contract. CP 49.

The Defendant does not dispute that he failed to return property or make alternate arrangements. He does not dispute that proper notice was made. He argues that there was insufficient evidence that he "received" proper notice and therefore insufficient evidence to give this instruction. AOB at 18, (*citing State v. Fleming*, 155 Wn. App. 489, 228 P.3d 804 (2010). The *Fleming* case upon which the Defendant relies is wrongly decided and in conflict with Washington Supreme Court case law.

The renter receives proper notice when the procedure outlined in the statute is followed. The owner sent certified mail in the proper form to the proper address. Therefore, Huesties received the notice that the statute requires.

In *State v. Fleming*, the defendant acknowledged that proper notice was made, but argued that it was not "received." *State v. Fleming*, 155 Wn. App. at 498. There, Quality Rentals initially tried to reach Fleming by phone, but there was either no answer or the person answering the phone would hang up. *State v. Fleming*, 155 Wn. App. at 494. No phone messages were left. *Id.* Next Quality Rentals sent an employee to Fleming's home and left a "final notice"

on his door. *Id.* Finally, they sent demand letters through certified mail. *Id.* Those letters were returned unclaimed. The court of appeals reversed Fleming's conviction, finding insufficient evidence that he "received" notice. *State v. Fleming*, 155 Wn. App. at 503.

The *Fleming* reading of the statute is that even when notice is proper under subsection (3), the presumption for which it is defined may not be inferred as directed under subsection (2). This ignores the entirety of the statute and is faulty construction.

The primary goal of statutory construction is to carry out legislative intent for the statute construed as a whole, giving effect to all the language used. *Ralph v. State Dep't of Nat. Res.,* 182 Wn.2d 242, 248, 343 P.3d 342, 345 (2014). The *Fleming* construction renders subsection (3) superfluous or insignificant. The notice was sent by certified mail, which is proper notice. If there was proper notice, it is tautological that proper notice was what Mr. Huesties "received."

In the instant case, similar to the *Fleming* facts, Pasco Rentals sent a certified letter to the address Huesties had provided in his contract. RP 31. Although it was the Defendant's true address and he actually resided at that address during the three attempted deliveries,

he never claimed the letter. RP 31-32, 48. This is proper notice under the statute.

Unlike in *Fleming*, here there is no doubt that the Defendant also had actual notice of the rental company's demand for return of their property. Pasco Rentals actually reached the Defendant by phone. RP 28, 32-33, 44-45, 48; PE 2. They also went in person to his home and spoke with his mother there. RP 33-34. However, Huesties never returned the property and did not make alternate acceptable arrangements.

The illogic of the *Fleming* holding is demonstrated in Washington Supreme Court case law.

In *Marriage of McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997), the Washington Supreme Court found that due process was satisfied when pleadings were served upon a party by certified mail with return receipt requested *despite the fact that the mailing was returned marked unclaimed*.

In that case, the mother filed a petition to modify the child support amount, serving her ex-husband by certified mail with return receipt requested. Under RCW 26.09.175(2)(a), proper service is "any form of mail requiring a return receipt." The documents were

returned marked "unclaimed" with notations indicating notice had been given on two different days. The petition was then sent by first class mail and was not returned. The father did not respond to the petition, and the child support obligation was modified without his participation by default. Seven months later the father tried to vacate the judgment arguing improper service. The Washington Supreme Court accepted review on the due process claim.

McLean argued that because the statute provided for a form of mail requiring a return receipt, then the Legislature required a return receipt of actual delivery. The court disagreed. *Marriage of McLean*, 132 Wn.2d at 307. It explained that there are other purposes served by the return receipt, namely: the return receipt (1) tracks what happens to the mail after it is sent so as to be useful in determining if the address is incorrect and (2) is proof of *sending*. *Marriage of McLean*, 132 Wn.2d at 307-08. The statute and the court did not allow the father to avoid modification of the child support order by refusing to accept proper service.

In *Duskin v. Carlson*, 136 Wn.2d 550, 556, 965 P.2d 611, 613 (1998), the Department of L&I sent multiple communications which Duskin actually received but did not respond to. Duskin claimed that

service through certified mail violated his procedural due process. The Supreme Court disagreed. It found RCW 51.24.070 constitutional, although it did not require personal service or restricted delivery, because the notice required by the statute was reasonably calculated under all the circumstances to apprise parties and afford an opportunity to respond. *Duskin v. Carlson*, 136 Wn.2d at 557.

> Due process does not require actual notice in all circumstances. *Martin v. Meier,* 111 Wash.2d 471, 477, 760 P.2d 925 (1988). In fact, courts of this state have found mailed notice sufficient for due process purposes even where it is not actually received. *Baker v. Altmayer,* 70 Wash.App. 188, 851 P.2d 1257 (1993) (holding mechanic's lien statute does not require actual receipt of notice sent by registered or certified mail to owner of materialmen's intent to claim lien); *see also State v. Rogers,* 127 Wash.2d 270, 898 P.2d 294 (1995); *State v. Whitney,* 78 Wash.App. 506, 897 P.2d 374, *review denied,* 128 Wash.2d 1003, 907 P.2d 297 (1995).
>
> In determining what constitutes proper notice, we weigh the individual interest at stake against the important state interest involved. Duskin's property interest is control over a potential lawsuit. The Department's interest is efficient administration of the State's social insurance system and minimizing associated costs to the industrial insurance fund. *Mills v. Department of Labor & Indus.,* 72 Wash.App. 575, 578, 865 P.2d 41 (1994). Certified mail is efficient and inexpensive. Service of actual notice would entail a far greater burden. *Marriage of McLean,* 132 Wash.2d at 311–12, 937 P.2d 602.
>
> In this case, Duskin's wife received and signed for the Department's letter to her husband. Duskin

> simply did not see it because his wife placed it in a cupboard. Certified mail, which is proper service under the statute, was reasonably calculated, under all the circumstances, to reach Duskin.

Duskin v. Carlson, 136 Wn.2d at 557-58.

In statutes in all different contexts, the Legislature does not permit a party to evade responsibility by dodging service. RCW 9A.56.096 is one of those. Courts respect this common legislative intent. The return receipt when certified mail is sent verifies a party's reasonable attempt to serve. If notice was properly made under the definitional statute, it was properly received. Here there is sufficient evidence of notice. Accordingly, the defense was not deficient in failing to object to the correct instruction.

And here Huesties additionally admitted he had actual notice of the demand for return of property. Despite that actual notice, he did not return the property or many alternative arrangements. No prejudice can be shown.

2. <u>The court properly gave the missing witness instruction where only the Defendant knew about the witness and failed to share that information until he took the stand</u>.

The Defendant argues that his counsel should have challenged Instruction No. 12, WPIC 5.20. AOB at 22. The instruction states that

a jury may infer that a witness who was not called to testify would have provided testimony unfavorable to a party "only if" the jury also finds the witness is peculiarly available to that party and his absence is not satisfactorily explained. CP 51. The Defendant argues that the instruction was "not supported" as to Mr. Rodriguez. AOB at 30. In fact, the record abundantly supports that only the Defendant had any information to assist in locating Mr. Rodriguez and that he withheld all information from the State until the moment of cross-examination.

The Defendant appears to claim surprise that the missing witness instruction would regard Mr. Rodriguez, and not merely John and Lisa. AOB at 30. This is unlikely. In motions in limine, the prosecutor gave notice of his intent to request this instruction as to this very witness. RP 15. This comment was made after a long discussion about the possible exclusion of any testimony as to uncorroborated existence of Mr. Rodriguez. CP 33; RP 7-15.

The Defendant argues that merely because he claimed he could not find Mr. Rodriguez, the court should be satisfied with this explanation of his absence and should believe that the witness was not peculiarly available to him. AOB at 31. This is not persuasive. It is logical that a criminal defendant who is either keeping a prejudicial

witness from testifying or inventing another suspect will not provide the State with any real or meaningful information which may assist in locating or verifying the existence of the witness. Here the Defendant not only failed to provide useful information, he failed to provide any information at all.

The Defendant never informed Pasco Rentals that another person had the property. RP 45 (Defendant told Pasco Rentals only that "I would take care of it"), 56. He testified that he did not give Pasco Rentals the address where he claims to have left their property, and that he "really didn't want to" share this information with them. RP 60. He did not even provide his own attorney with the witness' address until a month before trial. RP 59. The Defendant testified that his friend John could have verified the existence of Mr. Rodriguez, but he chose not to subpoena John or give the State any information about John. RP 13, 62.

It was apparent that he had provided no information to the State to assist law enforcement in finding the witness who supposedly was in possession of the dehumidifier. The prosecutor was investigating the existence of Tony Rodriguez <u>for the first time</u> as the Defendant testified. RP 51, 56-57 (asking what other persons may

have information to assist in locating the witness); 54 (asking what kind of vehicle might be registered under the witness' name); 56 (requesting the witness' date of birth). The prosecutor questioned why the Defendant would not share Mr. Rodriguez's identity with anyone. "Don't you think it would be helpful to have other people, more eyes, to go look for Mr. Rodriguez?" RP 56.

When Officer Erickson was recalled to testify the next day, he explained that "as a result of listening to Mr. Huesties' testimony yesterday" he had been able to make inquiries into the existence of Mr. Rodriguez. RP 83-84. He was unable to verify Mr. Huesties' claim that Mr. Rodriguez had ever lived at the address. RP 84-85.

The Defendant claims he is being penalized for not having more information on Mr. Rodriguez. AOB at 31. This is false. The Defendant had information on Mr. Rodriguez. He knew a name, an address, a phone number, a physical description, and the names of other people who might have other information. Investigators could have used this information to find Mr. Rodriguez. The Defendant did not share any of this. The instruction is permitted, because the evidence is that the Defendant never made any effort to assist Pasco Rentals or law enforcement in identifying, investigating, or locating the

person the Defendant claims to be in possession of $1400 of stolen property.

Because he withheld this information, which only he possessed, he cannot claim that Mr. Rodriguez was "equally unavailable to both parties." Because he could have assisted in finding Mr. Rodriguez by providing information to law enforcement, he cannot claim that he has satisfactorily explained the witness' absence.

The Defendant claims that he did not have a special relationship with Mr. Rodriguez. AOB at 31. This is not persuasive. The Defendant testified that it was the kind of relationship in which he was willing to guarantee $1400 in property for Mr. Rodriguez. Certainly, the Defendant was closer to Mr. Rodriguez that the State would be, learning of his existence only when the Defendant took the stand at trial.

The Defendant notes that the missing witness inference is not available if the testimony would "necessarily be self-incriminatory." AOB at 29, citing *State v. Blair*, 117 Wn.2d 479, 489-90, 816 P.2d 718 (1991); AOB at 32. But Mr. Rodriguez would not necessarily incriminate himself by testifying. Mr. Rodriguez did not sign the rental agreement. Mr. Rodriguez did not receive notice demanding the

property's return. There is no evidence that he knew the terms of the agreement, e.g. the rental price, when it should be returned, and to whom. Pasco Rentals could only have a replevin action against Mr. Rodriguez.

The courts have held it is proper to give the instruction where the defendant's own testimony establishes unequivocally that the absent person could have corroborated his story and where the state would have much difficulty in locating a person knowing only a first name. *State v. Montgomery*, 163 Wn.2d at 598 n.12. That is this case.

A party's available response to the proper giving of the missing witness instruction is to avoid the operation of the inference by trying to provide a plausible explanation for the witness' absence. *State v. Blair*, 117 Wn.2d at 489. Huesties' counsel did this repeatedly for several witnesses, thereby providing effective assistance. RP 43-46, 63. Because the instruction was proper, counsel's performance was not deficient. Because the Defendant's testimony was not credible, the only possible conclusion was that the property was wrongfully obtained. Therefore, the instruction was not prejudicial.

C. THE PROSECUTOR'S CLOSING ARGUMENT PROPERLY REVIEWED THE EVIDENCE' AND ARGUED THE INFERENCES.

The Defendant objects to the prosecutor arguing the permissible inferences in closing. AOB at 33-37. No objection was made, accordingly all claims of error are waived unless the argument was so flagrant and ill-intentioned as to be incurable by any court instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The courts will not find prejudicial error unless it is clear and unmistakable that counsel was not arguing an inference from the evidence, but rather expressing a personal opinion. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

The Defendant begins by claiming the missing witness instruction shifted the burden of proof. AOB at 33. Reference to a defendant's failure to produce a witness is not an impermissible shifting of the burden of proof. *State v. Blair*, 117 Wn.2d at 491. The jury was properly instructed as to who bore the burden. The jury instructions explained that the State had the responsibility of proving each element of the crime beyond a reasonable doubt and that the Defendant had no burden of proof. CP 42; RP 91.

The Defendant argues that the prosecutor argued the

instructed and permissible inference in an "exaggerated manner." AOB at 35. In fact, the prosecutor only fastidiously dissected the testimony.

The prosecutor explained that the only question for the jury was the Defendant's intent. RP 98. We know he did not intend to use the dehumidifier himself. He does not appear to have kept it. RP 33. And the explanation the Defendant offered was simply not believable. The only explanation that remains is that the Defendant rented the dehumidifier in order to dispose of it.

The Defendant believes it was improper to argue that he was not credible. AOB at 36. But witness credibility is a proper subject in closing, and the Defendant's testimony did not make sense. This was appropriate argument.

The prosecutor noted reviewed that very few details in the Defendant's testimony were credible. It was not credible that he failed to communicate with Pasco Rentals on a legal obligation so as to risk criminal charges, merely because, as he said, he was embarrassed. RP 98. It was not credible that good friends whom the Defendant had known for many years could not make themselves available for his criminal trial when their testimony might prevent a conviction. RP 98,

101-02.

The prosecutor argued that it was not plausible that, in exchange for help starting a car, the Defendant would guarantee $1400 in property for a mere acquaintance. RP 99. The Defendant would have the jury believe that this was a fair trade of favors. RP 99. But it was clearly disproportionate, and therefore not a credible story.

The Defendant said he was renting the dehumidifier late in the day in order to dry out a carpet before his kids arrived that evening. RP 99. But, by the Defendant's own admission, he knew there would not have been enough time for the dehumidifier to make a difference. What children could this possibly have helped?

As to notice, the Defendant claimed that there must have been a mix up by the postal service. RP 99. But it's not plausible that the post office would charge extra for special service and then not deliver. RP 100. Nor was it plausible that the postal service was deterred by something as mundane as dogs on the route. RP 100.

If property you rented was stolen, the rational thing to do would be to call the police. RP 100. The Defendant did not do this – even though he says Mr. Rodriguez took off with the dehumidifier leaving a disconnected phone and no forwarding address.

With a different renter living at the Sylvester address for the last six months (RP 84) and given the slow turnover of renters when property goes through auction, the prosecutor argued, it is likely that Mr. Rodriguez, whom the Defendant first disclosed on the day of trial, never actually lived at the address the Defendant provided. RP 102. And if every detail of the story is implausible, Occam's razor suggests the entire premise is an invention. Maybe there is no Mr. Rodriguez.

The prosecutor argued that the remaining inference was that the Defendant took the property to dispose of himself. Given that the Defendant had no income since December (RP 101), perhaps he "took it to sell." RP 100. Or maybe he gave it away in repayment of debt. RP 100 ("took it for trade"). Having eliminated every other intent, those are the remaining reasonable inferences. Both would be unlawful.

The prosecutor's argument fairly argues the inferences in the evidence. The Defendant has not shown error, flagrant or otherwise.

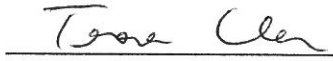
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 1, 2016.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



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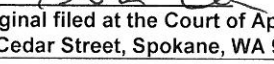
Kristina Nichols Wa.appeals@gmail.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 1, 2016, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**