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

HARLAN D. DOUGLASS, individually and as
Personal Representative of the Estate of **MAXINE H. DOUGLASS**

Plaintiff-Respondent

v.

BRYAN J. REILLY
Defendant-Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Harlan Douglass, on behalf of himself and as Personal Representative of the Estate Maxine Douglass¹, cites the evidence and details the many reasonable inferences from which the jury could, without speculating or relying upon conjecture, find it more probably true than not that Bryan Reilly was the person who damaged the Douglass' in the amount of \$605,148 by burglarized their safe on September 25, 2015².

Over a two year period beginning on September 23, 2013 and ending on September 25, 2015, Bryan Reilly systematically stole jewelry, coins, gold, silver and cash from the home of Harlan and Maxine Douglass. The jury determined that over that two year period Reilly stole a total of \$1,157,681³.

Three days after the final theft of \$962,400 contained in four shoeboxes located in the Douglass' safe, \$357,252 was recovered. The jury returned a verdict in favor of the Douglass' for the entire difference,

¹ Between the time this action was filed and the date of trial Maxine Douglass passed from the effects of Alzheimer's.

² Nearly all of the events mentioned took place in 2015. Rather than continuously repeating the year it should be assumed that unless otherwise stated all events occurred in 2015.

³ \$962,400 from the safe, \$96,600 in other cash and \$98,861.00 in jewelry, coins, gold and silver

\$605,148. In addition, the jury awarded Douglass \$195,281 for prior thefts of cash, jewelry, coins, gold and silver.

Harlan Douglass is referred to throughout as “**Harlan**” or “**Douglass**”. When Harlan and Maxine are referred to together they are referred to as **The Douglass**’. Harley Douglass, Harlan’s son, is referred to as “**Harley**”. Lisa Douglass, Harley’s wife, is referred to “**Lisa**”. It should be noted, however, that in the Report of Proceedings, Lisa is usually referred to by her nickname, “**Missy**”. Bryan Reilly will be referred to as “**Reilly**” and his Opening Brief will be referred to as “**ROB**”. “**J.I.**” refers to jury instruction and “**DST**” refers to daylight savings time.

Organization of Reilly’s Opening Brief

Reilly asserts three Errors;

- A. The Jury’s Verdict, awarding \$605,000 for conversion of money from the Douglass’ Safe is not supported by substantial evidence
- B. The trial court abused its discretion and erred as a matter of law by allowing the jury to speculate as to whether Bryan Reilly converted money from their safe.
- C. The trial court abused its discretion by not granting a mistrial when Respondent’s counsel intentionally violated the motion in limine preventing any mention Bryan Reilly had been charged with six felonies.

It was not possible to respond to ROB in the precise order presented because the order of the Issues and arguments do not follow the order of the three assignments of error. In addition to having failed to comply with RAP 10.3 (a) (4)⁴, Issues 3 and 4 of ROB pertain to Error A, and are supported by Argument “C” while Issues 1 and 2 pertain to Error B and are supported by Arguments “A” and “B”.

Organization of Harlan’s Response Brief

Section I of this brief addresses Error B where Douglass counter’s Reilly’s Arguments “A” and “B” which pertain to evidence. This enables Douglass to respond to Reilly’s first two Issues and first two Arguments,

Section II addresses Error A, Issues 3 and 4 and Argument “C” in which Reilly addressed damages.

Section III addresses Error C, Issue 5 and argument “E” where Douglass makes clear that Reilly’s mistrial argument was frivolous since Reilly well knows he claims was violated does not even exist.

Section IV addresses Reilly’s Argument “D” on bifurcation which wasn’t even designated as Error or mentioned in Reilly’s identification of Issues.

Section V addresses Reilly’s request for attorney fees.

⁴ The rule requires that a number be inserted parenthetically after each Issue to identify the number of the Assignment of Error to which an issue pertains. Every Issue should therefore be linked to one or more Error.

I

THE EVIDENCE AND INFERENCES REQUIRED THAT THE JURY DETERMINE REILLY'S INVOLVEMENT AND AMOUNT OF DAMAGES. ACCORDINGLY, THE TRIAL COURT DID NOT ERR IN DENYING REILLY'S MOTION FOR JUDGMENT

In Section I Douglass addresses **Error B, Issues 1 and 2 and Arguments "A" and "B" of ROB**. At Error B Reilly contends the trial court abused its discretion in denying his Civil Rule 50(a) (1) motion for judgment as a matter of law. He argues that the trial court allowed the jury to speculate. The opposite is true. It would have been error for the trial court to take the question of Reilly's theft from the safe from the jury in the face of overwhelming evidence.

Abuse of Discretion Defined

Abuse of discretion requires a clear showing that discretion was exercised manifestly unreasonably, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). When there is abundant evidence coupled with compelling inferences sufficient to sustain the verdict a motion for judgment must be denied. *Brown v. Dahl*, 41 Wn. App. 565, 573, 705 P.2d 781 (1985).

A Motion for Judgment Could Not be Granted Unless There Was No Legal Basis on Which the Jury Could Find for the Douglass'

Civil Rule 50(a) (1) authorizes the trial court to render judgment as a matter of law only when there is no legally sufficient basis for a reasonable jury to find for the nonmoving party.

In deciding Reilly's motion for judgment which challenged the sufficiency of the evidence the trial court was required to assume that Douglass' evidence and all inferences that reasonably could be drawn therefrom was true and to then interpret the evidence most strongly against Reilly and in the light most favorable to Douglass. *Brown v. Dahl*, 41 Wn. App. 565, 573, 705 P.2d 781 (1985). (citing *Billingsley v. Rovig-Temple Co.*, 16 Wn.2d 202, 203, 133 P.2d 265 (1943); *White v. Fenner*, 16 Wn.2d 226, 230, 133 P.2d 270 (1943)).

Where there are justifiable inferences from the evidence upon which reasonable minds might reach different conclusions, the questions are for the jury and not for the court to decide. No element of discretion is lodged in the trial court in such matters unless it can be held as a matter of law that there is no evidence or reasonable inference therefrom to sustain a verdict for the opposing party. *Brown v. Dahl* at 573 (citing *Miller v. Payless Drug Stores*, 61 Wn.2d 651, 653, 379 P.2d 932 (1963)).

Substantial evidence is simply the amount sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

The Elements of Conversion

Conversion is the unjustified, willful interference with a chattel that deprives a person entitled to the property of possession. *Repin v. State*, 198 Wash. App. 243, 270, 392 P.3d 1174 (2017). Money is a proper subject of conversion where, as here, it is received “at one time, by one act and in one mass”. *Brown v Brown*, 157 Wn.App. 803, 818, 239 P.3d 602 (2010). Theft obviously satisfies the elements of unjustified, willful, deprivation from the person entitled.

Douglass’ Burden of Proof

The trial court gave an unchallenged jury instruction on preponderance of evidence which stated in relevant part;

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence ... it means that you must be persuaded, considering the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true

(J.I.# 5; CP 2419).

A. **From the Mountain of Evidence and the Reasonable Inferences Therefrom it Was More Probable Than Not That Reilly Was The Person Who Stole the Money From The Douglass’ Safe**

In this sub-section Douglass identifies the evidence which left the trial court no alternative but to deny Reilly’s motion for judgment and left the jury no alternative to returning the verdict which Reilly now attacks.

Later, in sub-section “B”, Douglass addresses Reilly’s arguments on circumstantial evidence. In Sub-Section “C”, Douglass outlines the reasonable inferences available to the jury which support its verdict.

The Evidence

1. **The Extraordinary Circumstances Surrounding Reilly’s Immediate Discovery of a Bag of Money Buried Somewhere on Harlan’s 400 Acre Property and His Inexplicable Ability to Devine the Contents of the Buried Bag Was Compelling Evidence That it Was More Probable Than Not That Reilly Put the Money in the Bag and Buried it**

On September 28 Reilly attended a meeting during which Lisa Douglass expressed the seriousness with which the investigation of the theft would be pursued. Reilly was informed that Lisa was bringing in the FBI and was scheduling polygraph tests. (RP 1572;8–1573;22).

That very afternoon Reilly called Lisa and informed her that he had seen a suspicious car parked alongside Colbert Road opposite Harlan’s property. His “alertness was heightened due to what had been happening at Harlan’s house”. (RP 730;15-16). He told her he was going to get his four-wheeler to *see what was going on*. (RP 1580;16–1583;19). Reilly’s call drew Lisa and Harley to Harlan’s property. (RP 1584;7-10).

Despite Reilly’s *concern* upon seeing the suspicious car, and with Harlan still out of the country, Reilly failed to proceed down the driveway to check on the house. Instead, he drove right past the driveway to

exchange his pickup for his four-wheeler. (RP 668;10–669;9) (RP 735;4–9). He then drove the four-wheeler onto Harlan’s property. However, instead of proceeding down the driveway to the house, Reilly rode about 50 yards past the driveway before entering Harlan’s property. (RP 741;17-22). He then traveled north on a route that took him within 50 yards of Harlan’s house. (RP 743;9–744;1).

Yet, again, Reilly failed to check to see if anyone was burglarizing Harlan’s home. When asked why he hadn’t, Reilly blamed a barbed wire fence. When asked why he didn’t just get off his four-wheeler, climb over the fence and check the house he replied; “***why would I?***” (RP 744;16-23). A few minutes earlier Reilly had testified that part of his job was protecting Harlan’s property. (RP 737;23–738;1).

Not long after riding onto Harlan’s property Reilly called Lisa again, informing her he had found a shoebox lid with the word *counted* written on it. (RP 740;20-25). Lisa was on the phone with Reilly as Harley was nearing Harlan’s gate. Reilly told her not to park at the house;

Don’t go to the gate of the house, it’s faster if you come to the church parking lot.

(RP 1586;1-2) (RP 1585;22) (RP 1689;1-24).

Complying with Reilly’s instruction, Harley turned his pickup around and drove in the opposite direction, away from Harlan’s driveway

and proceeded to the church parking lot. Since they were now entering Harlan's property from the church lot instead of from Harlan's driveway Harley and Lisa had to walk on a particular path to get to where Reilly awaited them with the shoebox lid. They later learned that the path Reilly caused them to take took them within fifteen feet of the location where Reilly had partially buried \$357,252 in a plastic bag. (RP 1690;8-19) (RP 1761;12-1762;7).

After seeing the shoebox lid the three began to look for additional evidence. (RP 1573;25-1574;1). Harlan's property consists of 400 acres. (RP 737;25-738;3). They only looked around an hour or so. (RP 765;23-25). The search was halted because it was getting dark. (RP 1591;12-25). All three then headed south toward the church parking lot. (RP 768;1-769;14). As they neared Harley's pickup Reilly unexpectedly turned his four-wheeler one hundred eighty degrees back to the north. (RP 1592;6-14). Lisa asked Reilly where he was going and he replied,

I just kind of think that that trench and that fence line has something to do with it. I'm going to go look at that area again

(RP 1593;17-23).

Harley remembered Reilly saying;

I just have a strange feeling that there's something over there by the fence. I have a feeling there's something back there. I want to go check it out.

(RP 1768;15–1769;13).

After riding a short distance back to the north Reilly made a U-turn and headed back south. (RP 773;15–774;1). All of a sudden, lo and behold, his moving four-wheeler, Reilly spotted *some disturbed pine needles* fifteen feet off the path. Under the pine needles Reilly saw a small piece of a white object which he *assumed* was a bag. (RP 774;24–775;17). Crucial to the case was Reilly’s testimony that he *could not see what was in the bag.* (RP 776;8-17). He immediately rode toward the parking lot to tell Lisa and Harley. (RP 777; 12-23).

Within minutes of Reilly having ridden off to the north Lisa heard the racing engine of Reilly’s four-wheeler rapidly approaching from behind. Reilly was yelling;

*I found something. I think I found something
and I see 50s and 100s.*

(RP 1595;7-10).

Lisa asked; “You saw 50s and 100s”? Reilly answered;

*Yeah, and it’s not very far, get on, I’ll take you to it,
it’s right over here.*

(RP 1595;11-13).

Harley heard Reilly as well, recalling him to have said;

*I think I found it, I think I found something.
I see fifties and one-hundreds.*

(RP 1770;3-5).

Also crucial to the case was Reilly's trial testimony upon seeing what turned out to be a bag and before he headed back to inform Harley and Lisa, he could not see what was in the bag. (RP 776;8-17). Reilly further testified that even after he and Lisa arrived back at the location of the bag he looked at it again and because the bag was covered with pine needles he still couldn't see any bills. (RP 779;10-13). Reilly told the jury it was only when Lisa removed the pine needles that he could see bills pressed up against the side of the bag. (RP 779;4-9) (RP 779;16-19). Even then he couldn't see any fifties until Lisa tore a hole in the bag. (RP 803;13-16).

As for Lisa, even after poking two fingers into the bag she couldn't see any money. It was only after pulling the bag open that she could see money. (RP 1597;4-1598; 4).

Mounted on Reilly's four-wheeler were two toolboxes, one on the front and one on the rear. Both toolboxes were large enough to hide the shoebox lid. (RP 749;3-750;10). The toolbox on the back was large enough to conceal the bag of money found by Reilly. (RP 755;2-8). Interesting also is the fact that when Lisa mentioned she needed another bag into which the found money could be placed, Reilly pulled *a white plastic bag from the front toolbox*. (RP 1775;14-23).

As an aside, just weeks after the burglary, Reilly gave housekeeper, Tricia Weiland, \$500.00 he had owed her for three prior cleanings of his mother's house. At the same time he gave her a \$100.00 tip. According to Weiland it was very unusual to receive a tip like that. Normally, if she received a tip, it was generally a coffee card. (RP 420;7-421;7).

2. **Reilly Intentionally Failed to Arm Harlan's Security System the Day Before the Burglary and Failed to Arm it as He Drove Past Harlan's Home on The Day of the Burglary**

In September of 2015 Harlan had a security system installed to protect the cash stored in his new safe. (RP 608;21-609;19). When armed, the system would record the identity of anyone entering or exiting the Douglass' home. (RP 623;12-624;2-6). Reilly supervised the installation. (RP 610;1-3). He knew there was a large sum of money in the safe. (RP 620;9-25). It was Reilly's job to arm the system once they system was completed and operational. (RP 646;1-19). When the system had been completed ADT trained Reilly on its use. (RP 622;5-623;7). The system went live at 7:59 a.m. on September 24. (RP 966;2-17).

At around 10:00 a.m. on September 24 Reilly and Lisa met at Harlan's home so Reilly could show her the system. (RP 633;11-20). As they were leaving, Reilly, who had told Lisa the system had gone live that

morning, failed to arm it. (RP 1553;11-22). When she inquired why, Reilly told her the housekeeper, who was coming in the morning, had not been instructed on the system and he didn't want her to *trip it*. He told Lisa he was going to meet the housekeeper the next morning to show her how to operate the system. (RP 1553; 20-1554; 3). Reilly didn't show up. (RP 434;25-435; 3).

Reilly, however, told the jury a completely different story than he told Lisa. He told the jury that he didn't arm the system as he and Lisa left Harlan's house because;

— *It was not live*

— *It wasn't connected to anything*

— *The alarm could go off but it wouldn't notify anybody*

— *It was not fully functional*

(RP 646;10-13) (RP 673;12-13).

Reilly's testimony regarding his reason for not arming the system on September 25 as he drove right past Harlan's house on his way to Hill's Resort was even more troubling because there he contradicted his own testimony, not just Lisa's.

Reilly testified that his route from his parents' house to Hill's takes him right past Harlan's driveway. (RP 669;11-17). Since Reilly had not armed the system on the 24th and had not met the housekeeper on the

morning of the 25th to arm it, he was asked why he didn't stop and arm it as he drove past Harlan's home on his way to Hill's. (RP 669;18-19). Here Reilly gave not just one, but numerous answers each contradicting the other.

Reilly Forgot

Wait—Reilly Didn't Forget

I just completely forgot (RP 656;21-22)	
	I thought about it. There was just no need. (RP 656;21-22)
It just spaced my mind. (RP 669;18-20)	
	It didn't make sense to me. I mean, I didn't put a lot of value on arming the system since the system was not a hundred percent up and running. (RP 670;1-3)
	This system was not fully functional. (RP 671;12-13)

To resolve the discrepancy between the conflicting testimony of Reilly and Lisa, and even between Reilly and himself, Otis Simmons, the ADT installation manager, was called to testify. (RP 958;16–959;4). From Simmons the jury learned the system was complete on September 17. (RP 964; 14- 23). The system went live on September 24, 2015 at 7:59 a.m. (RP 966;2-17). In the event of any alarm activity after that time ADT would dispatch. (RP 966;18–967;4). Sirens would sound for four minutes. (RP 972; 7-11). Law enforcement would be notified. (RP 982; 7-9).

3. **Reilly's Cell Phone Records Exposed His Alibi as False and Informed the Jury Further of His Sketchy Relationship With the Truth**

Douglass was limited by a pre-trial order to an hour and twenty-five minute window during which he was allowed to establish that Reilly burglarized his home. He had to establish that it was more probable than not that the burglary was committed by Reilly between 2:00 p.m. and 3:25 p.m. on September 25, 2015. (Pg 5, ROB). Harlan accomplished that feat without difficulty nearly entirely due to Reilly's testimony regarding finding the buried money and by his constant dissembling from which the jury was left no alternative but to conclude that Reilly simply was not credible.

For example, Reilly testified over and over again that he left his parents' home for Hill's Resort at 2:00 p.m. (RP 673;18-674;4) (RP 675; 13-18) (RP 677;12-14)⁵. Reilly contends that time designation on a video from the Hill's Resort security system showing him arriving at 4:02 p.m. proves he could not have burglarized Harlan's home between 2:00 and 3:25 p.m. (RP 677; 5-6) (RP 900;8-10).

⁵ In ROB he now claims that he left his parents' home at approximately 2:15 p.m. (Pg 24, ROB, citing to RP 899). However, RT 899 contains no testimony pertaining to a 2:15 departure. Reilly simply testified that he left his sister at their parents' house at 2:00. (RP 899;20-25). In fact when asked if it was 2:00 or 2:15 when he left for Hill's Reilly specified it was closer to 2:00 than 2:15. (RP 803;24-804;3).

Reilly's Cell Phone Records Established That He Was Still Within 3.1 Miles of Harlan's Home Through 3:25 p.m. on September 25

The burglary was investigated by Detective Mark Newton of the Spokane County Sheriff's Office. (RP 327;24–328;2). Newton secured a warrant for the records for the cell phone which Reilly admitted was on his person or in the pickup he was driving all of September 25. (RP 359; 15- 360; 14) (RP 680;11-23).

Harlan retained former FBI special agent, Don Vilfer, now a principal of VAND Group, a California firm specializing in digital forensic investigations and accounting to analyze Reilly's cell phone records. (RP 993;2–994;9-10) (RP 995;22–1000;7-10).

Reilly's cell phone records established he was within a 5,000 meter (3.1 mile) radius which included Harlan's home until 3:25 p.m. on September 25. (RP 1041;10–1042;15). Vilfer's un rebutted testimony conclusively established that Reilly had been deceptive with the jury in testifying he left his parents' home at around 2:00, drove straight to Hill's and arrived at 4:02. Vilfer testified that Reilly could not have been at Hill's Resort by 4:02. (RP 1045;25–1046; 3)⁶.

⁶ Reilly testified that it takes him an hour and a half to an hour and three-quarters to drive to Hill's. (RP 677;12-14) (RP; 900;3-7).

Reilly's propensity to mislead didn't end with the trial. Reilly attempts to confuse this Court with representations which are just not true. For example, at pages 15 and 23 respectively of ROB the following knowingly false representations were made to this Court;

Reilly's cell phone records show that at 3:39 on September 25, 2015 Reilly's phone was connected to the cell tower at the top of Schweitzer Mountain Ski Resort.

the cell phone records established that at 3:39 PM Reilly was in the area of Schweitzer Mountain traveling north to Hill's

The forgoing, taken from Detective Newton's initial report are meant to misguide this Court. As Reilly knows, at trial Newton readily acknowledged that his failure to account for DST during his initial attempt to decipher Reilly's phone records caused him to be off by one hour. (RP 407;21-408;2).

Vilfer told the jury the same thing. (RP 1021;9-25). Newton's admission should have been disclosed to this Court instead of presenting incorrect versions corrected by Newton at trial. What was known to be false and misleading information should not by having been certified as true by the subscription at the end of ROB.

Vilfer testified that AT&T uses a universal time called UTC, previously referred to as Greenwich Mean Time or GMT. (RP 1019;4-6). Pacific Daylight Time was the standard for both Washington and Idaho on

September 25. (RP 1020;5-8). In 2015, DST ended on November 1. (RP 1020;14-16). To correctly convert the UST time shown on Reilly's AT&T records it would have been necessary for Newton to subtract seven hours from the UTC time listed on the records in order to find the correct Pacific Daylight Time. (RP 1020;23–1021;8).

Newton admitted that his attempts at *deciphering* Reilly's cell phone records were performed without any training. (RP 361;21-25) (367; 3-7). He testified that when he wrote his report and inserted the 3:39 p.m. entry as the time Reilly's phone was pinging off of the tower at Schweitzer Mountain he believed the difference between Greenwich Mean Time (the prior designation of UTC) and Pacific Daylight Time was eight hours. (RP 407;15–408;2). At trial, Vilfer and Newton concurred that the correct number of hours to subtract in order to find the correct Pacific Daylight Time was seven. (RP 1020;23–1021;8).

Vilfer confirmed that it wasn't until 4:39 p.m. that Reilly's phone began pinging off of the tower at Schweitzer Mountain, a tower not even within range of Hill's. (RP 1046;11–1047;18). Vilfer then confirmed the obvious; If Reilly was connected to the tower on Schweitzer Mountain at 4:39 he could not be at Hill's Resort at 4:02. (RP 1047;16-22)⁷.

⁷ We await Reilly's Reply to find out if he can explain to this Court why he represented Newton as having determined that Reilly's phone connected to

The strawman argument to the effect that Vilfer was unable to show that Reilly was actually burglarizing Harlan's home on September 25 is patently transparent. Vilfer was obviously not retained to show that Reilly burglarized the safe. He was retained to establish that Reilly was untruthful when he testified that he began his journey to Hill's at 2:00.

Reilly's Alibi Fails Even if he Had Left His Parents' Home at 2:00

Reilly testified that it takes him an hour and a half to an hour and forty-five minutes to drive from his parents' house to Hill's. (RP 677;12-14) (RP; 900;3-7)⁸. He drove right past Harlan's house. (RP 669;11-17). Even if Reilly had left his parents' house at 2:00 and had arrived at Hill's at 4:02 he still had ample time to stop at the unoccupied Douglass' home and spend **up to a full half hour** removing four shoeboxes full of money from Harlan's safe, the combination to which he knew⁹. Accordingly, even without Vilfer's testimony, the alibi on which Reilly based his entire defense was unavailing.

Schweitzer Mountain at 3:39 after Newton acknowledged from the witness stand that his 3:39 calculation was a mistake, off by one hour.

⁸ Reilly also admitted that it's possible he could have made it in less than an hour and a half. At trial he attempted to qualify his answer by saying "potentially". When his recollection was refreshed with his deposition transcript he was reminded that then he agreed that he could have made it in under an hour and a half. In fact he testified that he could possibly have made it in an hour and 17 minutes. (RP 678;25-679;19).

⁹ See pages 23, 24 for verification

4. **Vilfer Also Established That the Hill's Resort Video Recorder Had Not Been Set to Account For Daylight Savings Time Further Damaging Reilly's Already Discredited Alibi**

Vilfer also conducted a forensic examination of the hard drive of the recorder which captured Reilly's image as he arrived at Hill's Resort on September 25. Vilfer concluded that the recorder had not been set to account for DST which meant that the 4:02 time stamp actually reflected an arrival time of 5:02. (RP 1049;2-5).

Vilfer spent over nine hours downloading the recorder's entire hard drive. (RP 1050;17-1051; 2). He then conducted a complete forensic examination of it. (RP 1051;21-1052;9). Vilfer testified that a physical act was necessary to set the recorder to account for DST. (RP 1054;3-1056;6). Reilly was unable to produce a witness to testify to having performed such an act in 2015.

If the recorder had been set to account for DST there would have been two separate files for the one hour of overlapping time since the recorder would have gone through that hour twice. (RP 1053;1-22). The required duplicate files were *not in the hard drive*. (RP 1057;3-1058;3). Vilfer concluded, therefore, that Reilly arrived at Hill's Resort at **5:02 p.m.** not 4:02 (RP 1049;2-5).

Nathaniel Powers is a systems engineer employed by Open Eye, the company that manufactured the recorder used at Hill's in September of 2015. (RP 2030;15–2031; 1). Powers was familiar with the recorder. (RP 2033;6). Powers supported Vilfer's testimony that had the recorder been set to account for DST there would be two separate files for the duplicated hour. Powers confirmed that if two files for that duplicated hour were not on the hard drive the DST function **had not been set up**. (RP 2048;4–2050;2). Powers was unable to refute Vilfer's testimony that the duplicate files did not exist, admitting he had no way of knowing because he had not conducted an analysis of the recorder. (RP 2050;5-7).

Craig Hill is the owner/operator at Hill's Resort. (RP 1831;24–25). He testified that a password was needed to change the daylight savings time function on the recorder. (RP 1854;20-22). Hill testified that Cindy Schanilec, the Hill's accountant, was the only person who possessed the password. (RP 1853;2-3) & (RP 1854;16-19). Hill admitted that even he didn't have it. (RP 1852:25–1853;1). Hill acknowledged that any adjustment performed on the recorder would have been done by Schanilec. (RP 1855;15-19).

Schanilec testified she had the password and only ever adjusted the recorder once to account for DST. (RP 2154;21–2155;20). When, under questioning by Reilly's attorney Schanilec was given the chance to say

that she adjusted the recorder to account for DST in 2015—she didn't. She merely stated that she didn't know. (RP 2156;12-14). Accordingly, there is no evidence that the recorder was set to adjust for DST in 2015 and Vilfer's and Power' testimony established it wasn't.

The jury was left with no alternative but to accept that Reilly left the area at or near Harlan's home at 3:25 and arrived at Hill's at 5:02, a journey that took him one hour and thirty seven minutes which was exactly within the time frame to which he testified but not at the times he swore to.

5. Though the Jury Already Had Sufficient Evidence From Which it Could Reasonably Conclude Reilly Burglarized Harlan's Safe—There Was Yet More

Reilly Had Total Unfettered Access to Harlan's House

It was Reilly's job to bring in the newspaper and mail when Harlan was out of town, to let workers in when repairs were needed and to deal with the housekeepers. (RP 599;23-600;12). Part of Reilly's job was protecting Harlan's property. (RP 737;23-738;1). He had even been placed in charge of having the security system installed in September of 2015. (RP 610;1-3).

Reilly had a gate clicker that opened the gate to Harlan's driveway. (RP 631;4-11). He had a garage door opener that allowed him access into Harlan's garage. (RP 631;19-23). Reilly knew the location of the nail

inside the garage on which Harlan kept the key to the door leading to his kitchen. (RP 631;24–632; 2).

Reilly Knew the Combination to Harlan's Safe

Reilly had also seen the combination to the safe. Weiland had found the combination while cleaning Harlan's home and had told Reilly about it. (RP 414;14-23) (RP 457;8–458;7). Thereafter, for an extended period of time encompassing the next four or five cleanings, the combination remained on the Harlan's kitchen counter. (RP 458;12-14).

Reilly's arguments on pages 18, 25, 26 and 20 of his brief which claim there was no evidence that Reilly ever possessed the combination to Harlan's safe misrepresents the evidence. Reilly initially told the jury that he had not seen the combination which had been lying around Harlan's house for weeks. (PT 634;22-24). When he finally admitted having seen it he then made up a story about the combination actually being to Harley's safe. (RP 635;5-17) (RP 635; 17-19). He was made to admit he had no basis for claiming the combination was to any safe other than Harlan's. (RP 635;25–636;2).

When Douglass' Counsel thought that finally, after much effort, he had Reilly cornered, Reilly, as was often the case, came up with yet another different story; now he wasn't even sure the four numbers on the piece of paper constituted a *combination*. (RP 636;5).

Furthermore, Allied Safe confirmed that the combination had never been changed. (RP 1647;15– 1648;6). It is doubtful that Reilly's dishonesty went without notice of the jury.

Jerri Via, ("**Jerri**"), a friend of Harlan's, testified that shortly after the safe was delivered she wrote the combination on a post-it note and stuck it to the inside of the medicine cabinet in Harlan's bedroom bathroom. (RP 1276; 5–1278;2). Harlan confirmed Jerri's testimony. (RP 1361;25–1362;4). Reilly was often at Harlan's house when Harlan was not. (RP 599;23–600;2) (RP 631;4–632;2).

In order for the safe to properly lock the dial had to be turned *past the fourth number*. (RP 1278;20–1280;1). Jerri testified she was not certain that she had turned the dial past the fourth number before they left for Paris on September 21. (RP 1280;2-5) (RP 1285;2-12).

Reilly Used a Light Timer at Harlan's House on the Day He Burglarized it

Reilly makes much of Detective Newton's initial conclusions. Newton's initial belief that the burglary occurred early Saturday morning, September 26, was based on the security patrol noticing that a light went off sometime after 10:00 p.m. on September 25. (RP 361;18-20). However, at trial, the jury learned that Reilly sometimes used light timers in order to make it look like someone was home when the house was

empty. (RP 647;18–648;8). Reilly admitted to having used a timer on September 25. (RP 648;23–649;1). Had Newton known about Reilly’s use of light timers it would have affected his earlier investigation by opening up the time frame. (RP 351;13-21).

Gloves Were Found Hidden Under the Back Seat of Reilly’s Pickup the Day After the Burglary

At page 14 of ROB a big deal is made of the fact that Reilly’s fingerprints were not found on the bag containing the money. However, Jake Hill admitted that on the day after the burglary he found a pair of gloves under the back seat of Reilly’s pickup. (RP 1209;16–1210;22).

B. The Law Does Not Distinguish Between Direct Evidence and Circumstantial Evidence and One is Not Necessarily More or Less Valuable Than the Other

At argument **“B” of ROB he addresses his Issue #2** which incorrectly argues that circumstantial evidence is insufficient to support the verdict. Reilly’s position is that before the jury could conclude that he stole the money from the safe it would be necessary for an eye witness to testify to having seen him do it. He makes a similar argument regarding *possession* of the money. Obviously this is not the law.

Proof may be by direct or circumstantial evidence. Any fact may be proved by circumstantial evidence. *Tabak v. State of Washington*, 73 Wn.App. 691, 696, 870 P.2d 1014 (1974). A verdict does not rest on

speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts. *State Farm v. Padilla*, 14 Wn.App. 337, 338, 540 P.2d 1395 (Div 3 1975).

Reilly is correct when he points out the obvious—that a verdict based *only* on theory and speculation cannot stand. He goes too far, however, in inferring that a verdict based on circumstantial evidence cannot be confirmed. Reilly’s argument even conflicts with the unchallenged instruction given the jury on direct and circumstantial evidence.

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on our common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

(J. I. #2; CP 2416).

The evidence outlined in Section I.A. above and the inferences from that evidence detailed in this Section I.B. do more than simply point to Reilly as a person who *might have* burglarized the safe. The standard at play, *preponderance of evidence*, only requires a showing that it is more

probable than not that Reilly was the person who stole the money. *Carlton v. Vancouver Care LLC*, 155 Wn.App. 151, 169, 231 P.3d 1241 (2010); (J.I. #5; CP 2419).

In His Opening Brief Reilly Wrongly Equates Circumstantial Evidence With Speculative Evidence or Evidence Based Only On Conjecture

Reilly cites *Arnold v Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953) and three related cases each standing for the proposition that a verdict based only upon speculation cannot stand. Douglass does not argue with that obviously true proposition. However, the main lessons learned from *Arnold* and the three related cases cited by Reilly are found at page 98 of *Arnold*;

There must be reasonable inference from the evidence to support the verdict. The evidence must be viewed in the light most favorable to the party against whom the motion is made. All competent evidence favorable to the party who obtained the verdict must be taken as true, and that party must be given the benefit of every favorable inference which reasonably may be drawn from the evidence. If there is substantial evidence to support the verdict, it must stand. Substantial evidence is that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.

In *Gardner v Seymour*, 27 Wn.2d 802, 180 P.2d 564 (1947), a case also cited by Reilly, the Court notes the test to be applied is whether the jury could have determined the appellants were liable as a reasonable inference from the evidence, or whether the verdict rests on conjecture. (at

808). The *Gardner* Court also made a point of noting that one is not required to make proof as an absolute certainty. The Court goes on to state:

It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the thing in question happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable. In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.

(*Id* at 808-809). (see also *Carlton v. Vancouver Care LLC*, 155 Wn.App. 151, 169, 231 P.3d 1241 (2010)).

C. **The Reasonable Inferences to be Drawn From the Evidence Compelled the Conclusion Reflected by the Verdict**

The imposition of liability does not rest upon speculation or conjecture when the facts relied upon to establish a theory by circumstantial evidence are of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. *Nejin v City of Seattle*, 40 Wn.App. 414, 421, 698 P.2d 615 (1985) (citing *Grobe v. Valley Garbage Serv.*, 87 Wash.2d 217, 225-26, 551 P.2d 748 (1976)).

1. **Reasonable Inferences Arising From Reilly's Contradictions Regarding The Alarm System Support the Conclusion That He Wanted to Leave No Electronic Footprints on the Day of The Burglary**

Otis Simmons of ADT established that Reilly had not been truthful with the jury about the system not being operable. Reilly and Lisa had significantly different versions of the conversation they engaged in regarding setting the alarm on September 24. It would be understandable if the jury had begun to question Reilly's credibility. It would not be unreasonable for it to include that Reilly didn't arm the system because he didn't want to leave electronic footprints.

From Reilly's contradictory testimony regarding why he had not armed the system as he drove by Harlan's home on September 25 on his way to Hill's, the jury knew conclusively that Reilly had lied to them since his testimony vacillated between having forgotten to not having forgotten. Both couldn't be true. The jury, having been given no other good reason why Reilly failed to arm the system was free to conclude that Reilly simply didn't want the system armed because he had plans to burglarize the safe and didn't want it known he was in the house that day.

2. **Inferences Arising From the Curious Circumstances Surrounding Reilly's Fortuitous Discovery of the Bag Of Money Made it More Probable Than Not That Reilly Burglarized Harlan's Home**

By itself, the fact that with the search having ended and the three being nearly back to the parking lot, that Reilly would suddenly take off and go back in the direction from where they had just come and within minutes find the bag of money on the 400 acre property provides reasonable basis for the jury to infer that Reilly knew where the bag of money had been hidden.

Additional evidence however, is as damning. For example, as Reilly turned and rode away from Harley and Lisa Reilly simply said;

I just kind of think that that trench and that fence line has something to do with it. I'm going to go look at that area again.

(RP 1593;17-23).

I just have a strange feeling that there's something over there by the fence. I have a feeling there's something back there. I want to go check it out.

(RP 1768;15-1769;13).

Consider further that at this specific spot on 400 acres of land Reilly would spot a small white object buried well enough under pine needles that he couldn't see what, if anything, was inside the white object yet be able to tell Harley and Lisa; ***I see fifties and hundreds***

The jury was left with only one reasonable conclusion. Reilly stole the money from the safe, put part of it into a bag, hid the bag and then found the bag for some purpose known only to him. With this evidence there was no need for the jury to speculate or engage in conjecture in finding that Reilly was the person who stole the money. How else could he have known what was in the bag or where the bag was located?

On this evidence alone, Harlan had met his burden of proof. The Court's jury instruction on preponderance of evidence stated in relevant part;

When it is said that a party has the burden of proof of any proposition, or that any proposition must be proved by a preponderance of the evidence ... it means that you must be persuaded, considering the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

(J.I.# 5; CP 2419).

The jury needed nothing further. However, there was an abundance of additional evidence all strongly supporting the only conclusion to which the jury could come. For instance, Reilly supposedly went home to get his four-wheeler so he could check for nefarious activity detrimental to Reilly's employer. However, if Reilly was truly concerned about trespassers he would have driven his pickup down the driveway to check Harlan's house while the *suspicious* car was still parked in the road.

It would obviously be of paramount importance to make sure the house was secured before traipsing off into the woods.

Moreover, even after taking the time to get his four-wheeler Reilly still didn't ride down Harlan's driveway to check the house. Instead, he rode right past the driveway and 50 yards beyond before entering Harlan's property. He then and rode to within 50 yards of the house yet still failed to check. Reilly's answer as to why was; *Why should I?*

This, in addition to what the jury knew about finding the money screamed that Reilly had not told the jury the true reason for his being on Harlan's property that day or the true reason for bringing his four-wheeler.

Reilly's four-wheeler had front and back tool boxes large enough to conceal the shoebox lid and the bag of cash. From this and the other evidence mentioned about not checking for intruders at the home, the jury could infer that Reilly brought the four-wheeler onto Harlan's property so he could easily get the shoebox lid and the bag of money from his parents' house or his pickup to the back of Harlan's property, past the berms, ditches and concrete blocks, without being seen with them.

The jury also knew that if the shoebox lid had really been where Reilly claimed to have found it on the 28th Lisa and Harley would likely have seen it on the 27th as they looked around the area for evidence. (RP 1568;9-14) (RP 1572;3-5).

The jury might have wondered why Reilly sacrificed a third of the loot? However, having learned of the ferocity exhibited by Lisa as she described to Reilly and others the extent to which she was going to have the crime investigated, the jury was entitled to infer that Reilly determined that sacrificing part of them money might take the heat off and preserve over \$600,000 that he still has.

This is supported by the fact that amongst the cash, Reilly put various notes, envelopes and writings which tied the cash to that stolen from the safe. For example the tally sheet showing the \$264,900 count from one shoebox. (RP 1267–1269) (Ex P-73). Obviously he wanted to leave no doubt that the money in the bag came from the safe.

However, Reilly's reason for hiding and then finding the money, known only to him, was of no importance.

3. **When Reilly's Cell Phone Records Exposed His Alibi As Made Up The Jury Was Left to Wonder Why He Lied To Them About the Time He Left For Hill's Resort**

By dismantling Reilly's alibi Vilfer further demonstrated to the jury that they couldn't accept Reilly's testimony as true. Vilfer established that Reilly was still within 3.1 miles of Harlan's home at 3:25 p.m. and that Reilly had not left for Hill's at 2:00 as he had sworn under oath. Vilfer established that Reilly only arrived at Hills at 5:02.

Juries are not required to be forgiving with witnesses who are repeatedly untruthful on material issues. Given the evidence and the various reasonable inferences to be drawn therefrom it is not surprising that of the inferences which might be drawn from the evidence the jury likely drew those most damning to Reilly.

4. **Additional Evidence Supported the Single Reasonable Conclusion—Bryan Reilly Was the Thief**

At this point the jury had before it considerable and compelling evidence, all pointing toward Reilly. Yet, there was still more evidence so related to other evidence mentioned above that the only conclusion that could fairly or reasonably be drawn was that Reilly was the thief. (see *Nejin v City of Seattle*, 40 Wn.App. 414, 421, 698 P.2d 615 (1985)).

There was Reilly's unfettered access to Harlan's home. The fact that the burglary was staged to make it look like whom ever did it had to enter through a window. Reilly had used a light timer at Harlan's on the 25th which at first thrown Newton off course. There was the evidence involving the combination and Reilly's lies related to it. Reilly still had a pair of gloves hidden under the back seat of his pickup on the day following the burglary.

Finally, Reilly paid Weiland a \$100.00 cash tip on an overdue \$500.00 invoice as if the money he was spending wasn't his which was interesting though not determinative.

The jury also heard additional evidence which we know from the verdict compelled it to conclude that over the two years immediately preceding his burglary of the safe, Reilly had stolen \$98,861 worth of the Douglass' jewelry and an additional \$96,600 of cash from locations in Harlan's home other than the safe. (CP 2434-2436; Verdict Form).

These items of evidence, taken together, and stacked on top of the circumstances surrounding the finding of the money, the cell phone records and the evidence involving the alarm, establish it was more probable than not that Reilly stole the money. The mountain of evidence as a whole and inferences just described left the jury with no alternative to returning the verdict it did.

II

THE \$605,148 JURY AWARD WAS SUPPORTED BY UNREBUTTED EVIDENCE

In Section II Douglass now addresses alleged **Error A, Issues 3 and 4 and Argument "C" of ROB**. In Error A Reilly contends that the evidence from which the jury found that Harlan was being deprived of

\$605,148 was not adequately supported by the evidence¹⁰. At page 32 of ROB, he argues that Harlan needed to prove the exact amount he stole from his safe. Reilly cites *ESCA Corp. v. Seattle-First National Bank*, 86 Wash. App. 628, 639, 939 P.2d 1228 (1998) in support of his argument that the goal of awarding money damages is to compensate for losses that are actually suffered. While true, the law does not require one to prove damages with precision.

Uncertainty as to the precise amount of damage is not fatal. *Carlton v. Vancouver Care LLC*, 155 Wn.App. 151, 169, 231 P.3d 1241 (2010) (also see *V.C. Edwards Contracting v Port of Tacoma*, 7 Wn.App. 883, 888, 503 P.2d 1133 (1972)). In fact, the unopposed jury instruction on precision of damages provided;

***Damages must be proved with reasonable certainty.
Damages are not rendered uncertain because they
cannot be calculated with absolute exactness***

(Jury Instruction #15, CP 2431).

Moreover, a defendant, like Reilly, whose wrongful acts gave rise to the injury may not benefit from the difficulty of determining the precise amount of damage when the plaintiff has produced the best evidence available and such evidence is a sufficient basis for estimating his loss.

¹⁰ The actual award was \$605,148 and as will be shown in this Section, it is important that the correct verdict amount is used.

V.C. Edwards at 888-889. (citing *Reefer Queen Co. v. Marine Constr. & Design Co.*, 73 Wash.2d 774, 440 P.2d 448 (1968).

Where evidence is not sufficient to ascertain damages with mathematical precision as long as it provides a reasonable basis for allowing the fact finder to exercise its sound discretion the verdict will stand. The *Edwards* Court noted that the reviewing Court will not disturb a proper exercise of sound discretion. (Pg 889).

In *Kwik-Lok Corp v Pulse*, 41 Wn.App. 142, 702 P.2d 1226 (Div. 3 1985) this Court, following *Edwards* and *Reefer Queen*, held that evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating the loss. Recovery will not to be denied because the amount of damage is not susceptible to exact ascertainment. (*Reefer Queen* at 781).

122 years ago, in *Hotel v Baltimore and Ohio Railroad*, 169 U.S. 26, 37, Justice Harlan, wrote;

Absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done

At page 39 Justice Harlan went on to write;

it does not ‘come with very good grace’ for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Eastman Kodak v Southern Photo Materials*, 273 U.S. 359, 379 (1927).

A. The Jury Concluded That Harlan Had Suffered Damages of \$605,148 by Reilly’s Theft From His Safe

The jury knew from the evidence that \$357,252 had been recovered from the plastic bag Reilly hid. From the evidence it came to the conclusion that there had been \$970,200 placed into the safe. It arrived at its \$605,148 damage calculation by subtracting the amount recovered along with a reasonable amount of cash taken from the safe for the trip to Paris, determined by the jury to be \$7,800. As shown below, the figures are all in evidence or the result of reasonable inferences or mathematical calculations therefrom.

1. The Jury Knew That \$357,252 Had Been Recovered on September 28

The money was counted the night it was found. A tally sheet was created consisting of three columns. At the top of the sheet was written the total, \$417,406. (Ex 65 identified and admitted at RP 1608; 23- 1610;

20). Testimony, however, indicated that June 27, 2017 it was discovered that one of the three columns on that tally sheet had been added incorrectly and the true total was \$357,252. (Ex 66 identified and admitted at RT 1611;24–1612;22). The new count was \$342,252. However, by the time the new count has been taken, \$15,000 had been removed and paid to Tanner Haynes as part of his fee for investigating the burglary. (RP 1615; 17–1616;5). Accordingly, it would be entirely proper for the jury to conclude that \$357,252 had been recovered inside of the plastic bag¹¹.

2. The Jury Had Sufficient Evidence to Adequately and Reasonably Determine That \$970,200 That Had Been Counted and Placed Into the Safe

On August 3, 2014, Harlan and Jerri counted the cash in two of four shoeboxes in which Harlan had accumulated. (RP 1263;14-17) (RP 1283;15-20). The total in the first box, \$264,900, was written on a sheet of paper and dated. (RP 1269;14) (Ex 72). They didn't remember the exact amount in the second box but did remember the total of the two boxes was between \$500,000 and \$550,000. (RP 1270;15-20). There being no other evidence on the issue it was entirely reasonable that the jury accept the lesser of the two totals for the two boxes. Using the smallest number which could be supported by the evidence presented no

¹¹ \$342,252 plus \$15,000 = \$357,252

disadvantage to Reilly. Accordingly, the jury was free to conclude there was \$235,100 in the second box¹².

Jerri and Harlan both looked inside the other two boxes. The contents looked the same as the contents of the two boxes they counted. (RP 1271;2-5) (RP 1360;25–1361;5). Both boxes were full. (RP 1272;1-5). Both weighed about the same. (RP 1265;17-19). The same kinds of bills were in the two uncounted boxes as in the two boxes that were counted. (RP 1361;1-5).

Within days of the count Harlan and Jerri told Lisa that in total, the two shoeboxes contained between \$500,000 and \$540,000 and that the other two boxes contained about the same amount as the two which were counted. (RP 1535;6–1536;14).

It would not, therefore, be unreasonable from the evidence for the jury to conclude that the contents of the two boxes which were not counted each contained \$235,100, the amount the jury determined to have been in the second counted box. In fact, from the evidence, that is the minimum it could have settled upon. On that basis the jury could

¹² \$264,900 plus \$235,100 equals \$500,000

reasonably conclude that there was a total of \$970,200 in the four boxes. \$264,900 in one and \$235,100 in each of the other three.¹³

3. The Jury's Determination That Harlan Took \$7,800 From the Safe For the Trip to Paris Was Not Unreasonable

The only evidence before the jury pertaining to the possibility of any money having been taken out of the safe prior to the burglary came from Jerri who testified that Harlan sometimes took money out of the safe when they went on trips. However, the only evidence of any trip having been taken between the time the money was placed into the safe and the burglary was the September trip Harlan and Jerri took to Paris. Reilly's attorneys failed to ask Jerri for any estimate of the amount of cash taken to Paris. Accordingly, with that cash being only a minor part of the equation, the jury was free to conclude on its own what a reasonable amount would have been.

Could it be said as a matter of law that \$5,000.00 was unreasonable? \$10,000? \$20,000? Probably not. The jurors were free to come up with an amount that they considered reasonable. We can easily back into the number the jury came up with; \$7,800.00. Simply add \$357,252, the amount found, and \$605,148 which results in \$962,400.

¹³ \$235,100 times 3 equals \$705,300. \$264,900 plus \$705,300 equals \$970,200.

Next subtract the \$962,400 from the \$970,200, the amount the jury could have reasonably determined was originally placed into the safe. The result is the amount the jury determined was reasonable for Harlan to have taken on his trip to Paris; \$7,800. At this juncture it is unimportant to know why the jury selected \$7,800 just that it is not an unreasonable sum.

4. **Not Only Was There Was Ample Evidence to Support The Jury's Calculations, Reilly Failed to Ask For Interrogatories in the Special Verdict Form Which Would Have Required the Jury to Disclose More Than Just the Amount of Damage**

The record fails to show that Reilly requested additional interrogatories in the Special Verdict Form which would have required the jury to disclose the amount it found to have been in the safe, the amount recovered and the amount taken on the trip. The Special Verdict Form was unopposed. Reilly was satisfied with a lump sum amount representing damages. (CP 2435). He is not now permitted to complain about lack of additional specificity on appeal.

Where a jury returns a lump sum verdict the court may not dissect the verdict into component parts. *Kiewit-Grice v. State of Washington*, 77 Wn.App. 867, 872, 895 P.2d 6 (1995). When there is no request to segregate items in a verdict, the court is without a basis to thereafter dissect the general verdict to determine what part represented what items. *Foster v. Giroux*, 8 Wash.App. 398, 400, 506 P.2d 897 (1973).

III

REILLY BASED HIS MOTION FOR MISTRIAL ON AN ORDER THAT DID NOT EVEN EXIST. ACCORDINGLY, HIS MOTION WAS PROPERLY DENIED

In Section III Douglass addresses alleged **Error C, Issue 5 and Argument “E” of ROB**. Error C contends that Douglass’ attorney *intentionally* violated a pre-trial order and the trial court abused its discretion in denying his motion for mistrial based upon the violation. Motions for mistrial are reviewed under an *abuse of discretion* standard. *State v. Thompson*, 90 Wn.App. 41, 45, 950 P.2d 977 (1998).

Reilly spent over five pages arguing that Douglass’ trial attorney **purposely violated** a trial court order in limine preventing mention that Reilly had been charged with six felonies for stealing jewelry, coins, gold, silver and cash from the Douglass’ home. Oddly, however, though Reilly designated 2475 pages of Clerk’s Papers he failed to designate the order which was supposedly violated¹⁴.

The order does not prohibit Douglass’ attorney from asking witnesses if he or she was aware that Reilly had been charged with six felonies. Just so there is no confusion, **Douglass’ 4th motion in limine** sought to preclude mention of prior criminal charges against Harlan

¹⁴ Douglass has moved this Court for permission to supplement the record to include the order. In the meantime a conformed copy of the Order is attached hereto as Appendix “A”

Douglass and Tanner Haynes. (RP 74; 21- 75; 13). Nowhere in that argument did Douglass seek to bar his own attorney from mentioning the charges against Reilly.

Douglass' 5th motion in limine sought to prevent Reilly's attorneys from mentioning that Reilly *had not* been criminally charged with the theft from the safe. (RP 78; 18-81; 16). The trial court granted Douglass' motion to preclude Reilly. (RP 85;7-11) (also see Appendix "A" which, on Harlan's motion to supplement should join the Clerk's Papers as CP 2476-2480).

It was only at the hearing that Reilly's attorneys thought it a good idea to ask the court to issue a similar order precluding Douglass from mentioning that Reilly had been charged with six felonies. Interestingly, even as they argued for the order, Reilly's attorneys acknowledged that Douglass should probably be able to make such reference in noting;

I think they probably do get to introduce that evidence...

(RP 80; 11-12).

However, since Reilly had failed to file a motion to preclude mention of Reilly's six felony charges the trial court refused to order Douglass not to ask about those charges when Reilly's attorney belatedly asked for such order at the hearing. The trial court stated;

So, Mr. Hassing, I understand there's not a motion before the Court to exclude evidence that he's been charged criminally on the previous matters so I guess I won't grant the motion because no one has brought that motion formally. But if that does seem to come up and the defense were to object, I'd probably sustain their objection...

(RP 85; 20- 25).

Accordingly, Douglass' attorney did not violate any pre-trial order when he asked Reilly's mother if she had been aware that Reilly had been charged with six felonies. Reilly's attorney objected and the trial court sustained the objection.

This part of the appeal, Error C, Issue 5, Argument "E", is frivolous. Worse, it is brought in bad faith as evidenced by the fact that Reilly, though he designated 2475 pages of Clerk's Papers, evidently did not want this Court to see the actual order on which this specious claim was based since he failed to designate it.

If Reilly believed the trial court erred in not granting what he might possibly have argued to be an untimely oral motion in limine he should have done so in his Assignment of Errors and argued it in his brief. He failed to do so and it is now too late as any such challenge has been waived. Accordingly, Douglass need not mount a defense to such error in this Response.

IV

REILLY FAILED TO DESIGNATE AS ERROR THE DENIAL OF HIS MOTION TO BIFURCATE. HE ALSO FAILED TO DESIGNATE ANY RELATED ISSUES FOR THE COURT TO CONSIDER

In Section IV Douglass addresses alleged **Error “D” of ROB.**

There Reilly argues that the trial court *abused its discretion* in denying his pre-trial motion to bifurcate. However, by failing to assign error to the denial or designate any related issues for this Court to consider, Reilly violated RAP 10.3(a) (4) and waived any right to relief.

RAP 10.3(a) (4) provides;

A brief of Appellant should contain a separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error

Orders on Bifurcation Are Reviewed For Abuse of Discretion

Matters of discretion, such as decisions on bifurcation, it will not be disturbed on review except on a clear showing of abuse which is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). If this Court does consider this part of Reilly’s Appeal it is obvious that in addition to failing to observe the rules he has failed to make the required showing.

Civil Rule 42(b) allows—but does not require—the trial court to order separate trials of claims or issues *when necessary* to avoid prejudice or when separate trials will be conducive to expedition and economy. In this case the trial court was right not to order bifurcation. Reilly's thefts of jewelry, coins and money from the Douglass' home over a two year period were all part of a common plan and continuing tort. Reilly's thefts began on September 23, 2013, obviously extending through this September 25, 2015 theft from Harlan's safe.

Reilly began stealing Douglass' coins and jewelry on September 23, 2013. (Exs. 38-1, 38-2 and 38-3). December 9, 2013 Reilly stole additional coins. (Ex. 39). On December 12, 2013, Reilly stole the Douglass' two Rolexes. (Ex 11). He stole even more coins on February 11, 2014. (Ex 40). He stole Maxine Douglass' diamond rings on March 17, 2014. (Ex 7). The jury calculated damages from these thefts alone to be \$98,861. (Special Verdict Form Interrogatories 1-10 at CP 2434, 2435).

Between 02/28/2014 and 09/02/2015, just twenty three days before he emptied the Douglass' safe, the jury found that Reilly had stolen \$96,600 in cash from the Douglass'. (Interrogatories 13 and 14, Special Verdict Form at CP 2436). It was logical that the torts be tried together. It also saved Weiland, Lisa, Harlan, Newton, and Haynes from having to

testify at what would basically be two different trials. Consideration must also be given to cost and time wasted by the jury and the court in requiring two trials.

This Court should refuse to consider this part of Reilly's appeal due to his violation of RAP 10.3(a)(4). In any event, Reilly has not shown clear abuse of discretion. The trial court obviously made the correct ruling on Reilly's motion to bifurcate.

V

THIS COURT DOES NOT HAVE AUTHORITY TO AWARD FEES UNDER THE STATUTE CITED BY REILLY. EVEN IF IT DID, DOING SO IN THIS CASE WOULD BE OBSCENE

Reilly cites RCW 4.84.185 as authority supporting his request for attorney's fees. However, any motion made under that statute must be brought before the trial judge, not this Reviewing Court. Any such motion must be filed within thirty days of the judgment which in this case was entered well over a year prior to the filing of this Responding Brief.

Further, RCW 4.84.185 only authorizes fees to the party prevailing at trial. In this case, Harlan Douglass prevailed on each and every one of his claims. Reilly lost on each and every one of his counterclaims and third party claims. Moreover, Reilly has failed to show any justification for an award of fees for any reason.

VI

CONCLUSION

Reilly's appeal contented that the trial court abused discretion in three separate instances, (1) in refusing to grant his motion to bifurcate the case, (2) in refusing to grant a mistrial and (3) in refusing to grant his motion for judgment when Douglass rested.

The claim of error regarding bifurcation was only asserted as an argument after Reilly failed to identify it as error or designate any issues for this Court's consideration. Moreover Reilly failed to establish abuse of discretion by clear evidence or at all.

Reilly's motion for mistrial was based upon an alleged order that Reilly knew did not even exist. That part of Reilly's appeal was frivolous.

It would have been obvious error to grant Reilly's motion for judgment based on the mountain of evidence and the inferences to be drawn therefrom. The trial court had no discretion to take the issue of liability or damages from the jury.

Looking at the evidence in the light most favorable to Harlan and least favorable to Reilly—as the law requires—and flavored by Reilly's significant credibility issues it is easy to understand, based on the evidence, that the jury concluded the following; Reilly kept the alarm off so that he could stop in on the 25th after the housekeeper, the pool cleaner

VI

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Looking at the evidence in the light most favorable to Harlan and least favorable to Reilly—as the law requires—and flavored by Reilly's significant credibility issues it is easy to understand, based on the evidence, that the jury concluded the following; Reilly kept the alarm off so that he could stop in on the 25th after the housekeeper, the pool cleaner

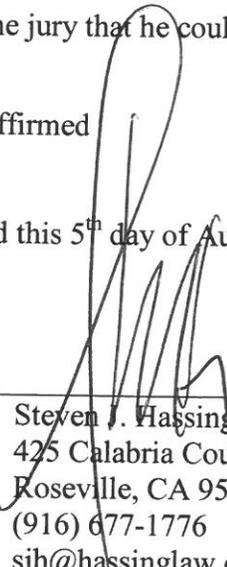
and the painters had left and using his normal permitted methods of entry and the combination, emptied Harlan's safe and set the light timer.

Three days later, the force with which Lisa and Harley tackled the investigation scared him. Thinking the heat might subside if they found part of the money Reilly cooked up a tale of needing to go onto Harlan's property to investigate. He put part of the money into a bag and hid it just well enough that Harley or Lisa might find it if they parked in the church lot. When they didn't and the search didn't turn it up, Reilly likely panicked, deciding on the spur of the moment to find it himself.

No one else could have found that money, hidden on 400 acres. But Reilly blew it when he excitedly told Harley and Lisa that he saw fifties and hundreds but then told the jury that he couldn't see anything.

Judgment should be Affirmed

Respectfully Submitted this 5th day of August,



Steven J. Hassing, WSBA #6690
425 Calabria Court
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(916) 677-1776
sjh@hassinglaw.com
Attorney for Harlan Douglass, Individually
And as Personal Representative of the Estate
Of Maxine Douglass

APPENDIX "A"

No. 36134-9-III

**TO RESPONSE BRIEF OF HARLAN DOUGLASS, individually and as Personal
Representative of the Estate of MAXINE DOUGLASS**

HONORABLE JOHN O. COONEY

CN: 201602001968

SN: 540

PC: 5

FILED

MAY - 2 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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

HARLAN D. DOUGLASS & MAXINE H.
DOUGLASS, husband and wife

Plaintiffs,

vs.

BRYAN J. REILLY, an individual, and
DOES 1-10

Defendants,

Case No.: 2016-02-00196-8

ORDER ON MOTIONS IN LIMINE

The parties argued Motions in Limine to the Court on April 6. Plaintiff presented twenty-one motions, Defendant presented five. After reviewing the moving and opposition papers filed and after listing to argument of Counsel, the Court issues the following Order:

Order on Motions in Limine

Plaintiff's Motions:

1. To Preclude Mention that Steven Hassing is a California Attorney

GRANTED

2. To Preclude Witnesses From the Courtroom Prior to Testifying

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3. To Preclude Mention of Unsubstantiated Allegations of Prior Fraud

GRANTED:

4. To Preclude Questions Concerning Prior Criminal *Charges*

GRANTED

5. To Preclude Mention That Reilly Has Not Been Criminally Charged With Theft From Plaintiff's Safe

GRANTED

6. To Preclude Objections to Leading Questions Asked of an Expert

GRANTED IN PART

Expert witness may be asked a few leading questions on matters of background and to develop the witness' testimony but if the attorney begins to effectively *testify* to material facts in place of the expert by means of leading questions, objection is appropriate and warranted.

7. To Preclude Objection to Questions Asked of an Expert as Relying on Hearsay or Because Information on Which the Expert Relied is Not in Evidence

GRANTED

8. To View The Site Where The Bag of Money Was Found if There is Adequate Time Between the Final Witness and Closing Arguments

RESERVED

9. To Preclude Any Mention to the Jury of Video Surveillance Evidence During Opening Statement as it Likely Will Not be Admitted

Denied

10. To Preclude Mention of Ex Parte Temporary Anti-Harassment Order Obtained by Defendant Against Tanner Haynes in mid-2016

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11. For Order Determining That Equitable Claims are to be Decided by the Court,
Not the Jury

GRANTED

The Jury shall decide Plaintiff's Conversion Claims and Defendant's Malicious Prosecution claim. All other claims shall be decided by the Court in the same proceeding. Since the jury will not be deciding any claim brought against the Third Party Defendants or Tanner Haynes, the fact that these individuals are defendants shall not be mentioned in the presence of the Jury. However, Defendant shall be able to question Third Party Defendants and Mr. Haynes pursuant to ER 611(c) without request.

12. That the Court Inform the Jury During Opening Instructions That One Month After This Case Was Filed Plaintiff Subpoenaed the Cell Phone Defendant Was Using on the Day That Plaintiff Alleges His Safe Was Burglarized. That Four Months Later, Instead of Turning it Over For Forensic Analysis Defendant Replaced That Phone With a New One, Thereby Denying Plaintiff's Forensic Analyst Access to the Phone.

DENIED without prejudice to revisit when end of trial jury instructions are issued

13. Seeking Order Prohibiting Defense Counsel From Objecting During Opening Statement or Trial Questioning When Plaintiff's Counsel Refers to the Conversion of Plaintiff's Money and Other Property as Having Been Stolen or the Result of Theft

GRANTED

14. To Preclude Testimony by or on Behalf of Defendant Regarding Money Received By Him in 2013-2015 Not Previously Disclosed in Discovery

GRANTED IN PART

Prior to offering evidence of money received by Defendant in 2013-2015 not previously disclosed during discovery, the matter will be discussed between counsel and the Court out of the presence of the jury.

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15. To Preclude Testimony by or on Behalf of Defendant Regarding Sale of Personal Property During the Years 2013-2015 Not Previously Disclosed in Discovery.

GRANTED IN PART

Prior to offering evidence of sale of personal property by Defendant in 2013-2015 not previously disclosed during discovery, the matter will be discussed between counsel and the Court out of the presence of the jury.

16. For Order Requiring Bryan Reilly Execute IRS Form 4506-T authorizing the IRS To Provide Full and Complete Copies of Tax Returns Filed by Defendant in 2016 and 2017 or, in the Alternative, Abstracts of Same and That he Execute the Form During Open Court on April 6, 2018 and Provide Same to Plaintiff's Counsel for Mailing to the I.R.S.

DENIED WITHOUT PREJUDICE TO FILE MOTION TO COMPEL

17. For Order Permitting Don Vilfer to View and Report Meta Data From Five Photos Believed to Have Been Taken by Defendant's Cell Phone And Which Defendant Intends to Offer Into Evidence at Trial

GRANTED

18. To Preclude Mention That Harley Douglass, Lisa Bonnett-Douglass, Hayden Douglass or Tanner Haynes was the Real Thief Unless or Until Defendant Can Introduce Evidence That Would Realistically Support Such Claim.

GRANTED

19. To Preclude Mention That Representation of Plaintiffs, Third Party Defendants and Tanner Haynes by Steven J Hassing Constitutes a Conflict of Interest or is Otherwise Wrongful

GRANTED

20. To Preclude Mention to the Jury During Opening Statement that Lisa Bonnett-Douglass' Fingerprints Were Found on the Plastic Bag Which Contained the Buried Money

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21. For Order Allowing Plaintiff to Dismiss his Negligence Claim Against Defendant

GRANTED: Plaintiff's Negligence Claim is dismissed.

Defendant's Motions:

1. To preclude mention in the presence of the jury of motions in limine.

GRANTED

2. To require Plaintiff to Abide by Judge Tompkins' Order on Mr. Reilly's First Motion For Summary Judgment.

DENIED AS WORDED AND ARGUED

3. To exclude witnesses pursuant to ER 615.

GRANTED

4. To elicit testimony of prior felony convictions of Tanner Haynes.

DENIED

5. To exclude evidence under ER 404(b).

GRANTED as to normal character evidence.

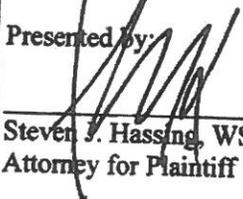
DENIED as intended to preclude evidence of Defendant' theft of Plaintiff's personal property to prove up those claims.

DATED this 16th day of April, 2018



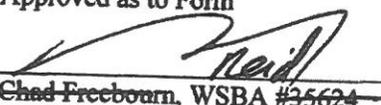
Honorable John O. Cooney
Superior Court Judge

Presented by:



Steven J. Hassing, WSBA #6690
Attorney for Plaintiff

Approved as to Form


Chad Freeborn, WSBA #35624
Attorney for Defendant
REID, WSBA # 34186

CERTIFICATE OF SERVICE

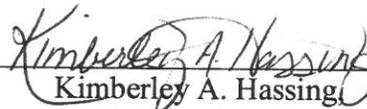
I certify that I served a true and correct copy of the foregoing **RESPONDENTS' BRIEF** by the method indicated below, and addressed to the following:

Derek Reid
Roberts & Freebourn, PLLC
1325 W. 1st Ave., Ste. 303
Spokane, WA 99201
derek@robertsfreebourn.com

via US Mail
 via Hand Delivery
 via Electronic Mail
 via Facsimile
 Overnight delivery via UPS

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

Signed at Roseville, California this 5th day of August, 2019



Kimberley A. Hassing
Paralegal to Steven J. Hassing

LAW OFFICE OF STEVEN J HASSING

August 05, 2019 - 4:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36134-9
Appellate Court Case Title: Harlan D. Douglass, et ux v. Bryan J. Reilly
Superior Court Case Number: 16-2-00196-8

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- ann@robertsfreebourn.com
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- kevin@robertsfreebourn.com
- victoria@robertsfreebourn.com

Comments:

Sender Name: Kimberley Hassing - Email: kah@hassinglaw.com

Filing on Behalf of: Steven John Hassing - Email: sjh@hassinglaw.com (Alternate Email: kah@hassinglaw.com)

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