No. 90846-0

NO. 44232-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICHOLAS KEITH MAYER,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

1. Assignment of Error 1

2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

1. Factual History 4

2. Procedural History 12

D. ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE FIRST DEGREE BURGLARY CONVICTION BECAUSE THE DEFENDANT NEVER STRAYED FROM AREAS OF THE BUILDING OPEN TO THE PUBLIC 19

II. THE TRIAL COURT'S USE OF AN INSTRUCTION THAT ALLOWED THE JURY TO CONVICT UPON AN ALTERNATIVE METHOD OF COMMITTING AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE DENIED THE DEFENDANT HIS RIGHT TO A UNANIMOUS JURY VERDICT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT 23

III. THE TRIAL COURT ERRED UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN IT DENIED A MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED AFTER ILLEGALLY DETAINING THE DEFENDANT BASED UPON INFORMATION PROVIDED BY AN ANONYMOUS INFORMANT 27

IV. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE POLICE TOLD HIM THAT HE COULD NOT HAVE THE HELP OF AN ATTORNEY UNLESS HE WAS FIRST ARRESTED AND TAKEN BEFORE A JUDGE 32

V. THE TRIAL COURT'S DECISION TO ALLOW A KEY STATE'S WITNESS TO VOUCH FOR HER OWN CREDIBILITY DENIED THE DEFENDANT HIS RIGHT TO HAVE A FAIR AND IMPARTIAL JURY BE THE SOLE JUDGE OF THE FACTS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT 39

VI. THE TRIAL COURT'S REFUSAL TO GRANT THE DEFENSE A CONTINUANCE IN ORDER TO EMPLOY AN EXPERT TO EVALUATE AND COUNTER LAST MINUTE DNA EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT. 45

E. CONCLUSION 50

F. APPENDIX

1. Washington Constitution, Article 1, § 3 51
2. Washington Constitution, Article 1, § 7 51
3. Washington Constitution, Article 1, § 9 51
4. Washington Constitution, Article 1, § 21 51
5. Washington Constitution, Article 1, § 22 52
6. United States Constitution, Fourth Amendment 52
7. United States Constitution, Fifth Amendment 52
8. United States Constitution, Sixth Amendment 53
9. United States Constitution, Fourteenth Amendment 53
10. RCW 9A.52.010(5) 54
11. RCW 9A.52.020 54
12. Jury Instruction No. 20 55

TABLE OF AUTHORITIES

Page

Federal Cases

Brown v. Texas,
443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) 27

Dunaway v. New York,
442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979) 28

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 19

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 20

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 32

Rhode Island v. Innis,
446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) 33, 34

Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 45

Terry v. Ohio,
392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) 27

State Cases

Hash v. State, 48 Ariz. 43, 59 P.2d 305 (1936) 42

In re R.R., 134 Wn.App. 573, 141 P.3d 85 (2006) 46, 47

State v. Allen, 57 Wn.App. 134, 787 P.2d 566 (1990) 23

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 19

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 32

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956) 40

State v. Denton, 58 Wn.App. 251, 792 P.2d 537 (1990) 40, 41

State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991) 32, 33

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967) 39

State v. Gooden, 51 Wn.App. 615, 754 P.2d 1000 (1988) 23

State v. Hart, 66 Wn.App. 1, 830 P.2d 696 (1992) 28

State v. Holland, 98 Wn.2d 507, 656 P.2d 1056 (1983) 33

State v. Hopkins, 128 Wn.App. 855, 117 P.3d 377 (2005) 28, 31

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 23, 24

State v. Klimes, 117 Wn.App. 758, 73 P.3d 416 (2003) 25, 26

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 19

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) 23

State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006) 20

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995) 38

State v. Reed, 102 Wn.140, 684 P.2d 699 (1984) 40

State v. Richmond, 65 Wn.App. 541, 828 P.2d 1180 (1992) 33

State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980) 28

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) 27

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 20

State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950) 41, 43

Constitutional Provisions

Washington Constitution, Article 1, § 3 . . . . . 19, 39

Washington Constitution, Article 1, § 9 32

Washington Constitution, Article 1, § 7 27

Washington Constitution, Article 1, § 21 23

Washington Constitution, Article 1, § 22 . . . . . 45, 46

United States Constitution, Fourth Amendment 27, 31

United States Constitution, Fifth Amendment 32

United States Constitution, Sixth Amendment 23, 39, 45, 46, 49

United States Constitution, Fourteenth Amendment 19, 46

Statutes and Court Rules

RCW 9A.52.010 21

RCW 9A.52.020 20

Other Authorities

R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) 27

ASSIGNMENT OF ERROR

Assignment of Error

1. Substantial evidence does not support the first degree burglary conviction because the defendant never strayed from areas of the building open to the public.

2. The trial court's use of an instruction that allowed the jury to convict upon an alternative method of committing an offense unsupported by substantial evidence denied the defendant his right to a unanimous jury verdict under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment.

3. The trial court erred under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment when it denied a motion to suppress evidence the police obtained after illegally detaining the defendant based upon information provided by an anonymous informant.

4. The trial court erred when it refused to suppress statements the defendant made during custodial interrogation because the police told him that he could not have the help of an attorney unless he was first arrested and taken before a judge.

5. The trial court's decision to allow a key state's witness to vouch for her own credibility denied the defendant his right to have a fair and impartial jury be the sole judge of the facts under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment.

6. The trial court's refusal to grant the defense a continuance in order to employ an expert to evaluate and counter last minute DNA evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment, does substantial evidence support a conviction for first degree burglary when the evidence presented at trial shows that the defendant entered an open restaurant through a door not normally used by the public but which opened into the public access area of the building?

2. Does a trial court's use of an instruction that allows a jury to convict upon an alternative method of committing an offense unsupported by substantial evidence deny a defendant the right to a unanimous jury verdict under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment?

3. Does a trial court's refusal to suppress evidence the police obtained after detaining a defendant based upon information provided by an anonymous informant violate that defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment?

4. Under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, does a trial court err if it refuses to suppress statements a defendant made during custodial interrogation after the police told him that he could not have the help of an attorney unless he was first arrested and then taken before a judge?

5. Under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment, does a trial court's decision to allow a key state's witness to vouch for her own credibility deny that defendant the right to have a fair and impartial jury be the sole judge of the facts?

6. Does a trial court's refusal to grant the defense a continuance in order to employ an expert to evaluate and counter last minute DNA evidence deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

A gentleman by the name of Hui Choe owns a small restaurant called KC Teriyaki located near the Fred Meyers store in the Salmon Creek area of Vancouver. RP 267-270.[1] His brother-in-law Aljuarsmi Ortiz works for him. *Id.* At a little before 9:00 pm on the evening of February 9, 2012, Mr. Choe took the money out of his cash register and put it in a bank bag along with his wallet as part of his normal closing procedures. RP 296-299. Although he usually locks the restaurant at 9:00 pm, he had a customer come in at the last minute and make a "to go" order. *Id.* He also had other customers in the restaurant finishing their meals. *Id.* As a result of the last minute order and the lingering customers, Mr. Choe placed the bank bag on a stool and went back to the kitchen to prepare the order. *Id.* As he did he told Mr. Ortiz to go ahead and go home. RP 267-270.

Once Mr. Choe went back in the kitchen Mr. Ortiz started to go out the side door. RP 271-275. Although apparently in the public area of the restaurant, this door was only used by employees to take out the trash and to enter and leave the restaurant. *Id.* It was also available to be used by restaurant patrons as an emergency exit if necessary. *Id.* When Mr Ortiz

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[1]The record on appeal includes 11 volumes of continuously numbered verbatim reports of the combined CrR 3.5 and CrR 3.6 hearing, the jury trial, and the sentencing hearing. They are referred to herein as "RP [page #]."

opened this door and tried to go out he was confronted by two white males in their 20s, average build, wearing bandanas and both carrying handguns. *Id.* These two men forced Mr. Ortiz back into the restaurant. *Id.* One of them pointed his pistol at Mr. Ortiz and demanded money. *Id.* The other robber then apparently saw the bank bag on the stool, grabbed it, after which both robbers fled out the side door. *Id.* Mr. Ortiz responded by calling 911 and telling Mr. Choe what had happened. RP 276-279.

Mr.Ortiz was not the only person to see the incident. RP 316-321. The lady who had come in with the last minute order also saw the robbery, and her husband sitting out in the parking lot saw the two men flee the building. RP 316-321, 336-342. However, they could not identify the robbers; neither could Mr. Choe. RP 276-279, 316-321, 336-342. Once the police arrived and took statements they looked in the area for the robbers but found nobody. RP 462. They also asked Mr. Choe if he had any disgruntled ex-employees and he gave them the name of Emily Mayer. RP 299-302. Mr. Choe had fired her a few months previous believing she had been stealing. *Id.* The police later determined that Emily Mayer had at least two brothers, one of whom was the defendant Nicholas Mayer, a known drug addict. RP 463-467. Based upon this information the police listed her and her brother as possible suspects. *Id.* The next morning the news reported the robbery. RP 538.

During the evening of February 10th, the Clark County Communications Center received a call from a person who only identified himself as "Matt" and he stated that he wanted to remain anonymous. RP 463-467. He then told the 911 operator that he had been at a bar in the Dollars Corner area of Battleground in Clark County, that he had overhead the defendant Nicholas Keith Mayer bragging that he had robbed a restaurant, that Mr. Mayer had a bunch of cash on him, and that Mr. Mayer was riding in a silver pickup. *Id.* Based upon this 911 call, the Clark County Sheriff's Officer mobilized a number of units, found the pickup in the Dollars Corner area, stopped it, and detained its three occupants: the defendant Nicholas Keith Mayer, his fiancee Sarah Baker, and a friend by the name of Mark. RP 362-365, 463-467. Once the defendant was taken into custody, one of the sheriff's deputies called "Matt," using the phone number that the 911 operator saw on her computer screen during the 911 call. RP 63-69. He was able to convince Matt to come forward and give a statement, which he did. *Id.*

Once at the precinct station sheriff's deputies interviewed Sara Baker. RP 365, 549-552. They then met with the defendant who was detained in handcuffs in an interview room. RP 549-552. Initially the officers read the defendant his *Miranda* rights and asked if they could record the interview. RP 72-75, 126. The defendant consented to the recording. *Id.* As a result

the officers started the recording and again read the defendant his *Miranda* rights. *Id.* The defendant responded to this second reading of his rights by asking how he could get a lawyer if he could not afford one. RP 79-80. One of the Sheriff's deputies responded by telling him that he could only get an attorney appointed to help him if he was arrested and taken before a judge. *Id.* This conversation went as follows:

> TAPE RECORDING (CONTINUED.)
>
> DEPUTY DENNISON: Okay. Do I have your permission to record this statement?
>
> MR. MAYER: Yes.
>
> DEPUTY DENNISON: Okay. And so you see the tape recorder sitting there and everything's –
>
> MR. MAYER: Yep.
>
> DEPUTY DENNISON: – okay, right? Has anyone made any threats or promises to you regarding this statement?
>
> MR. MAYER: No.
>
> DEPUTY DENNISON: Okay. So, you (inaudible). I read you your Miranda prior to it, but now that we're on - on recording, I'm going to read it to you again, okay? You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights as I've explained them to you?
>
> MR. MAYER: Yes. Um, If I wanted an attorney and I can't

afford one, what – what would – ?

DEPUTY DENNISON: If you wanted an attorney – you know, if you were charged with a crime and arrested, if you wanted an attorney and couldn't afford one, the Court would be willing to appoint you one. Do you want me to go over that with you again?

MR. MAYER: Yeah, but how would that work? Will you be – how it – how I –

DEPUTY DENNISON: You're not under arrest at this point, right?

MR. MAYER: Oh, okay. Okay.

DEPUTY DENNISON: So, if you were, then you would be taken to jail and then you'd go before a judge and then he would ask you whatever at that point, if you were being charged, you would afforded an attorney if you couldn't hi – you know, if you weren't able to afford one.

MR. MAYER: All right. I understand.

DEPUTY DENNISON: Understand?

MR. MAYER: Yeah.

DEPUTY DENNISON: Okay. So you do understand your rights?

MR. MAYER: Yes.

DEPUTY DENNISON: Keep your rights in mind. Do you want to explain to us or talk to us about -- all right, you know, I told you why you're here. There was a robbery at the -- at KC Teriyaki and your name has come up. So, keeping your rights in mind, do you want to talk to us about it?

MR. MAYER: Okay.

RP 78-80.

For a good portion of the defendant's interview with the police he denied any involvement with the robbery. RP 1179-1190. He then admitted that he was a heroin addict, that he had been one of the robbers, and that he was going to prison. RP 558-574.

Based upon the statements from the defendant and the others they had interviewed, Clark County Sheriff's deputies obtained and executed a search warrant at the single wide trailer where the defendant's sister Sarah Mayer and her boyfriend John Taylor were living. RP 608-612, While searching the back bedroom Emily Mayer and John Taylor shared they found the bank bag taken during the robbery with Mr. Choe's wallet in it, along with a .44 caliber pistol, a shotgun, jewelry, a laptop computer and other items. RP 616-630. The police later learned that the .44 caliber pistol, the shotgun, the jewelry, the laptop computer and other items had been stolen during a burglary at Nicholas and Gayleen Lies' house in rural La Center during the day on February 11th. RP 497-507. Mr. Lies was the ex-step father of the defendant and his sister Emily Mayer, who both had lived in Mr. Lies' La Center home when they were children. RP 493-496.

Based upon their findings the deputies arrested Emily Mayer and John Taylor. RP 924-925. These deputies also searched their vehicle and found a Glock .40 caliber pistol in the trunk. RP 630-635. Once under arrest Emily Mayer and John Taylor gave similar statements to the police.

RP 925. According to Emily Mayer, during the daylight hours of February 11th the defendant showed up at her trailer with items he said he had stolen out of Mr. Lies' house. RP 752-755. He then convinced her to drive him back to La Center so he could try to wipe his fingerprints clean from the inside of the home. *Id.* She then drove him to Mr. Lies' home where they both entered and took a number of items. RP 755-760. After leaving they returned to Emily Mayer's trailer and hid the items they had stolen. *Id.*

During their interviews with the sheriff's deputies Emily Mayer and John Taylor both gave the following story about the robbery. RP 770-781, 897-920. After John Taylor finished working and came home on February 11th, the defendant suggested they rob KC Teriyaki at closing time. *Id.* In fact, Emily Mayer had previously told them that it would be easy to rob the place given Mr. Choe's lax closing procedures. *Id.* The defendant then retrieved a .22 caliber revolver he had stolen earlier that day from Mr. Lies, and Mr. Taylor got his .40 Glock pistol, which was the same pistol the deputies later found in the trunk of his car. *Id.* Mr. Taylor claimed that the .40 Glock was unloaded and that the .22 caliber revolver the defendant had was loaded. *Id.* Emily Mayer then drove them to the vicinity of the Fred Meyers in Salmon Creek and dropped them off. *Id.* At this point the defendant and Mr. Taylor made their way to the restaurant, waited in the bushes by the side door until it opened, pushed Mr. Garcia back in, grabbed

the bank bag and fled. *Id.* Once they got a few blocks from the restaurant they called Emily Mayer who came and picked them up. *Id.* The cash bag had about $800.00 in it. RP 915-920. The defendant kept $500.00 and gave $300.00 to Mr. Taylor. *Id.* Mr. Taylor and Emily Mayer then dropped the defendant off in the Dollars Corner area of Battleground. RP 921-924.

Based upon the investigation they performed, sheriff's deputies also went to the home of Brandon Sheldon. RP 437-443. Once there they asked Mr. Sheldon if he had a gun that the defendant had given him to hold. *Id.* Mr. Sheldon replied that he did and he took them to his gun safe and opened it. *Id.* Inside the deputies found a .22 caliber pistol wrapped in a white bandana. RP 445-447. Later analysis revealed that both items had DNA on them. RP 1029-1030, Although the test on the DNA on the pistol was inconclusive, tests on the bandana revealed the presence of DNA from at least two persons on two different spots on the bandana. RP 1036-1039. The DNA from the "major contributor" from both locations on the bandana matched that of the defendant. RP 1040-1046, 1048. The possibility that the DNA from the first location on the bandana came from a person other than the defendant was one in five quintillion. RP 1046. The possibility that the DNA came from the second location on the bandana came from a person other than the defendant was one in seventeen million. RP 1048.

Procedural History

By information filed on February 12, 2012 and amended two weeks later the Clark County Prosecutor charged the defendant Nicholas Keith Mayer with the following offenses:

1. First Degree Robbery with two firearm enhancements at KC Teriyaki;

2. First Degree Burglary with two firearm enhancements at KC Teriyaki;

3. Residential Burglary for entry into Nick Lies' residence;

4. Theft of a Firearm for taking Nick Lies' .22 caliber Ruger pistol;

5. Theft of a Firearm for taking Nick Lies' .44 caliber Ruger pistol;

6. Theft of a Firearm for taking Nick Lies' Western Field 12 gauge shotgun;

7. Second Degree Unlawful Possession of a Firearm for possessing Nick Lies' .22 caliber Ruger pistol;

8. Second Degree Unlawful Possession of a Firearm for possessing Nick Lies' .44 caliber Ruger pistol;

9. Second Degree Unlawful Possession of a Firearm for possessing Nick Lies' Western Field 12 gauge shotgun;

10. Third Degree Theft for the other items take during the burglary at Nick Lies' house;

11. Attempted First Degree Trafficking in Stolen Property for trying to sell the .22 pistol belonging to Nick Lies;

12. Possession of a Stolen Firearm for possession of Nick Lies'

.44 caliber pistol; and

13. Possession of a Stolen Firearm for possession of Nick Lies' 12 gauge shotgun.

CP 2-3, 6-9.

The defense later filed a motion to suppress the defendant's custodial statements arguing that (1) the police obtained the statements by illegally stopping and detaining the defendant, and (2) that the police misinformed him of his right to an attorney during questioning. CP 15-19, 62-70. The court later held a hearing on these motions during which the state called four police officers and the defense called one witness. RP 12-147, 148-166. These witnesses testified to the facts concerning the stop and questioning of the defendant contained in the preceding factual history. *See* Factual History. The court denied the motions and later entered findings of fact and conclusions of law in support of its decision. CP 480-489.

At the readiness hearing in this case and on the first day of trial the defense moved to continue the trial date on the basis that it needed more time to obtain an expert to evaluate a recent report from the state concerning the probability that DNA allegedly taken from the white bandana came from a person other than the defendant. CP 524-530; RP 240-242. The court denied the motion. CP 146; RP 242. The defense later stated the following about the facts underlying this motion:

> At the readiness hearing on October 4, 2012, Defendant requested a continuance in the trial. The basis of the continuance was untimely discovery as Defendant argued and the motion set forth. The untimely discovery was DNA test results and the DNA lab file which left counsel with insufficient time to obtain an expert. The first laboratory report defense received was on August 6, 2012. In the report it concluded Defendant alleged DNA on a pistol said to have been part of the robbery was "inconclusive." Since the defendant was not going to contest the result it was not pursued further. However, in a report dated September 20, 20-12 and counsel receiving the report after that date, the state's DNA analysis further showed a bandana allegedly used in the robbery had a matching profile of Defendant's DNA at the level of 1 in 5 quintillion on part of the bandana, 1 in 3,700 individuals DNA profile on another area of the bandana and I in 17 million in a third area of the bandana. Defendant wanted to contest the results but he didn't receive the discovery of the actual lab file until after September 27, 2012.
>
> Defendant needed additional time to have his expert, Dr. Raymond Grimsbo of Intermountain Forensics review the state's procedure for accuracy in its DNA analysis and to obtain an expert on the probability of the matching profile the state suggested existed, such as Dr. Bruce Weir, of the Biostatistics Laboratory University of Washington Medical School.
>
> This gave counsel approximately eight days, before readiness hearing, to find an expert able to examine the report, send the data to the expert, get a report back, provide the results to the prosecutor, and be prepared to start trial. Deeming this to be an impossible task counsel requested a continuance at the readiness hearing as described above. The motion for continuance was denied.

CP 326-327.

These statements reiterated the defendant's claims made in its original written motion. CP 524-530.

The case thereafter came to trial with the state calling 20 witnesses and recalling three of those witnesses for further testimony. CP 266-1143.

These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. In addition during the direct testimony of Emily Mayer the defense objected when the state called upon her to comment on her own credibility by telling them that she had entered into a plea agreement with the state to provide truthful testimony. RP 727-737, 831-833. The court overruled this objection. RP 833. This exchange went as follows:

> Q. Could you read that paragraph right there, please?
>
> A. "The parties stipulated the – stipulate the defendant will be in breach of this agreement if the defendant makes any statement at any interview, hearing, or trial that is not completely truthful."
>
> Q. Okay. And what is your understanding if you were found to be untruthful in your testimony?
>
> A. That I would not have a plea bargain.
>
> Q. And that you would be back to square one?
>
> A. Yes.
>
> Q. So, your agreement is premised upon you testifying truthfully?
>
> A. Correct.
>
> Q. Now, when was the last -- I mean, correction: when was the first time you told the police what had happened?
>
> A. When I was arrested on February 11th. It was probably about 6:00 in the morning at that time that I made a statement.
>
> Q. Okay. And is that statement consistent with your testimony

today?

A. Yes.

MR. SOWDER: Objection. The consistency calls for an opinion, but they can compare the statements.

MR. VU: Her impeachment, she's –

JUDGE JOHNSON: Overruled.

RP 831-833.

Following their testimony the state closed its case and the court dismissed the trafficking charge without objection from the state. RP 1143-1144. The court then instructed the jury with the defense objecting to the concluding instruction offered by the state and given by the court. RP 1194-1195, 1201-1226. The court's "to convict" instruction on the first degree burglary charge read as follows:

INSTRUCTION NO. 20

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 9, 2012 the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building, the defendant or an accomplice in the crime charged was armed with a deadly weapon; and

> That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 252.

Following instruction the parties presented their closing arguments. RP 1126–1257, 1259-1316, 1316-1327.

During deliberations in this case the jury sent out two questions. CP105, 106. The first asked what the purpose was of charging the defendant with both robbery and burglary. *Id.* With the agreement of both parties, the court responded by stating as follows: "Read the jury instructions as a whole. We cannot provide any more information." CP 276; RP 1340-1342. The second question had a note on it that the jury was withdrawing it. CP 277. As a result the court, with the consent of both parties, did not respond. RP 1342-1343. The jury later returned verdicts of guilty on all counts and verdicts of proven on the four firearm enhancements. CP 278-291.

At sentencing the defense argued that convicting and sentencing the defendant on both the burglary and robbery charges in Counts I and II constituted double jeopardy and that each firearms theft should merge with the companion unlawful possessions of a firearm. RP 1386-1405. The court

rejected these arguments but did find that the burglary of KC Teriyaki constituted the same criminal conduct as the robbery. RP 1407-1410. The court then sentenced the defendant with the standard range and added 240 months in prison in enhancements on counts 1 and 2. RP 1416-1423; CP 504-518. The court also ran the firearm theft and unlawful possession charges consecutive to each other but concurrent with the other sentences. *Id*. The defendant thereafter filed timely notice of appeal. CP 529.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE FIRST DEGREE BURGLARY CONVICTION BECAUSE THE DEFENDANT NEVER STRAYED FROM AREAS OF THE BUILDING OPEN TO THE PUBLIC.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with first degree burglary under RCW 9A.52.020(1)(b), which states as follows:

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1)(b).

This offense has three essential elements: (1) an unlawful entry or remaining in a residence (*e.g.* a criminal trespass), (2) a concurrent intent to commit a crime therein, and (3) either an assault on a person in the building or being armed with a deadly weapon. *State v. Pittman*, 134 Wn.App. 376, 384, 166 P.3d 720 (2006). If the first element is not proven beyond a

reasonable doubt but the remaining two are, substantial element does not support a conviction. *Id.* By contrast, if either the second or third elements are missing, then substantial evidence only supports a conviction for the lesser included offense of trespass. *Id.*

The legislature has given the following definition to the term "enters or remains unlawfully."

> (5) "Enters or remains unlawfully." A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.
>
> A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.

RCW 9A.52.010(5).

In the case at bar the undisputed evidence presented at trial reveals

that the restaurant was open to the public at the time the defendant entered. Indeed, the entry occurred before closing at 9:00pm. Although close to closing, customers were still in the business and one had just entered and placed an order. While the record at trial is less clear on whether or not the interior area next to the side door was a part of the business open to the public, there is no evidence to support the opposite conclusion. It was not part of the kitchen and the only reference made was that it was "by a counter." Consequently, substantial evidence does not support a conclusion that the defendant "remained unlawfully" in the business because the public was impliedly invited to be in the restaurant in all areas where the defendant was.

In addition, the owner and employee testified that while the side door was not normally used by the public, customers were not barred from its use. Finding of Fact No. 6 from the suppression motion supports this conclusion. It states:

> 6. The side door of the restaurant is not commonly used by customers to go in or out of the restaurant.

CP 481.

"Not commonly used" is another way of saying "occasionally used." Thus, substantial evidence does not support a conclusion that the defendant entered unlawfully. As a result, the trial court erred when it accepted the

jury's guilty verdict on the charge of first degree burglary. Consequently this court should reverse this conviction and remand with instructions to dismiss this charge with prejudice and resentence the defendant on the other charges.

II. THE TRIAL COURT'S USE OF AN INSTRUCTION THAT ALLOWED THE JURY TO CONVICT UPON AN ALTERNATIVE METHOD OF COMMITTING AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE DENIED THE DEFENDANT HIS RIGHT TO A UNANIMOUS JURY VERDICT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under the United States Constitution, Sixth Amendment, the defendant in a criminal action may only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Allen*, 57 Wn.App. 134, 137, 787 P.2d 566 (1990)). As the court stated in *Kitchen*, "[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *Kitchen*, at 409 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)).

Failure to follow one of these options is constitutional error and may be raised for a first time on appeal, even though the defense fails to request

either option at trial. *State v. Gooden*, 51 Wn.App. 615, 754 P.2d 1000 (1988). Furthermore, the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411 (quoting *State v Loehner*, 42 Wn.App. 408, 411, 711 P.2d 377 (1985)). Once again quoting the court in *Kitchen*, "[t]his approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged." *Kitchen*, 110 Wn.2d at 411, (citing *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). Similarly, if the state alleges alternative methods of committing the same offense and the court instructs on both alternatives, the defendant's right to jury unanimity is denied if substantial evidence only supports one of those alternatives. *State v. Rivas*, 97 Wn.App. 349, 984 P.2d 432 (1999).

In the case at bar, the state charged the defendant with first degree burglary upon a claim that he and an accomplice entered a restaurant via a side door rarely used by the public, stole a bank bag, and fled, all while carrying firearms. At the time of entry the restaurant was still open for business, its front doors were unlocked, and customers were present. The information alleged that the defendant's conduct constituted a burglary both by "unlawful entry" and by "unlawful remaining." The jury instructions allowed for conviction under either alternative and did not require jury

unanimity on either alternative. However, since substantial evidence did not support the "unlawful remaining" alternative, the trial court's use of a general "to convict" instruction violated the defendant's right to jury unanimity. The decision in *State v. Klimes*, 117 Wn.App. 758, 73 P.3d 416 (2003), supports this conclusion.

In *State v. Klimes*, *supra*, the state charged the defendant with second degree burglary after the police found him in a junkyard then open to the public. The state alleged that the defendant was none the less guilty because he had entered illegally by climbing the fence in a far corner of the business with the intent to steal. The jury convicted and the defendant appealed, arguing that (1) under the burglary statute "unlawful entry" and "unlawful remaining" are alternative methods of committing the offense, and (2) the state failed to prove either "unlawful entry" or "unlawful remaining." The state responded by arguing that "unlawful entry" and "unlawful remaining" were a single element. The Court of Appeals agreed with the defendant's first argument, finding that "unlawful entry" and "unlawful remaining" are separate and distinct methods of committing the same offense.

Although the court agreed with the defendant's first argument, it did not accept the second argument. Rather, it found that while the defendant's presence was not unlawful given the fact that the junkyard was then open to the public, substantial evidence did support a finding that the defendant had

entered unlawfully. Thus, the court ruled that the proper remedy was remand for a new trial. The court stated as follows on this issue:

> Jury verdicts in criminal cases must be unanimous as to the defendant's guilt of the crime charged. In some situations, the right to jury unanimity includes the right to express unanimity as to the means by which the defendant committed the crime. The threshold test governing whether express unanimity is required as to an alternate means of committing the crime is whether sufficient evidence exists to support each of the alternate means presented to the jury. If the evidence is sufficient to support each such means, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary. But if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, a general verdict of guilt cannot stand unless the prosecutor elected or the court instructed the jury which means to rely on in its deliberations. Jury unanimity requirements may also be met if each of the means is supported by substantial evidence in the record and the means are not repugnant to one another.

State v. Klimes, 117 Wn.App. At 700 (citations omitted).

Similarly, in the case at bar substantial evidence does not support the conclusion that the defendant "unlawfully remained" in KC Teriyaki since it was open to the public and no evidence supported the conclusion that the defendant was ever in an area not open to the public. In addition in this case as in *Klimes*, the trial court used an instruction that allowed the jury to convict under the "unlawfully remains" alternative. In the case at bar this instruction violated the defendant's right to jury unanimity under the Washington Constitution in the same manner that the identical "to convict" instruction violated the defendant's right to jury unanimity in *Klimes*. As a

result, the defendant is entitled to a new trial on this charge.

III. THE TRIAL COURT ERRED UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN IT DENIED THE MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED AFTER ILLEGALLY DETAINING THE DEFENDANT BASED UPON INFORMATION PROVIDED BY AN ANONYMOUS INFORMANT.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets it burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979)

(emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point "the limited violation of individual privacy" is outweighed by the public's "interests in crime prevention and detection . . . ." *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

An informant's tip can provide police a reasonable suspicion to make an investigatory stop. *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980). However, the informant's tip must be reliable. *Sieler*, 95 Wn.2d at 47. A tip from an informant is "reliable" if the state establishes that (1) the informant is reliable, and (2) the informant's tip contains enough objective facts to justify the detention of the suspect or the non-innocuous details of the tip have been corroborated by the police, thus suggesting that the information was obtained in a reliable fashion. *State v. Hart*, 66 Wn.App. 1, 830 P.2d 696 (1992).

For example, in *State v. Hopkins*, 128 Wn.App. 855, 117 P.3d 377 (2005), the police made a *Terry* stop on a defendant based upon information provided by a named but unknown telephone informant. Specifically, police dispatch informed two officers of a citizen informant's 911 call that reported a minor carrying a gun. Dispatch reported that the informant described the

person as a "[l]ight-skinned black male, 17, 5' 9", thin, Afro, goatee, dark shirt, tan pants, carrying a green backpack and a black backpack." According to dispatch, the informant also reported that the person was "scratching his leg with what looked like a gun." According to dispatch, about seven minutes later, the informant called again and stated that the person was now at a pay phone at a certain address and that he thought the person put the gun in his pocket.

Although dispatch did not provide a name for the 911 caller, a computer inside the officers' patrol car displayed an incident report indicating the informant's name and cell phone number and a different phone number for the second call. However, neither officer attempted to contact this person. Neither did they know anything about the caller. Rather, the officers went to the public pay phone at the location the informant identified. Once there, they saw the defendant, a black male who resembled the informant's description, hanging up the phone. Neither officer observed a gun or any illegal, dangerous, or suspicious activity. Upon seeing the defendant, they approached and ordered him to raise his hands. They then frisked him and found a firearm. Upon determining who the defendant was, they also uncovered outstanding warrants for his arrest. A search of his person incident to arrest uncovered a small bindle of methamphetamine.

The state later charged the defendant with illegal possession of a

firearm and possession of drugs while armed with a firearm. The defendant responded with a motion to suppress, arguing that the information provided by a named but unknown telephone informant did not constitute a reasonably articulable suspicion based upon objective facts that the defendant was involved in criminal conduct sufficient to justify a *Terry* stop. The trial court disagreed, and denied the motion. Following conviction, the defendant appealed, arguing that the trial court had erred when it denied the motion to suppress. In addressing the issue concerning the reliability of the informant's information, the court of appeals held as follows:

> Generally, we may presume the reliability of a tip from a citizen informant. Here, the record demonstrates that at the time of the dispatch, the officers knew only that the informant was a citizen. Although the informant's name and cell phone number appeared on the officers' computer in their patrol car, they did not know the informant or the call's circumstances. The officers did not attempt to call the informant back on his cell phone or the other number to obtain more information about his suspicions. Indeed, one officer believed she should not contact the informant because "[t]he caller had requested no contact." RP at 20. We agree with the trial court that the officers "just assumed everything this guy told them, the tipster told them, was true." RP at 51.
>
> The State emphasizes that a citizen informant is generally presumed reliable and that the informant called back a second time regarding the person's location. But as discussed above, the informant's name was meaningless to the officers and the mere fact that the informant called again to update the person's location is unpersuasive. It may mean that the informant is watching the person, but it tells the officers nothing more about the informant's reliability. Further, a named and unknown telephone informant is unreliable because "[s]uch an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable."

> We hold that the State failed to establish the informant's reliability, thus it was reversible error to deny Hopkins' suppression motion.

State v. Hopkins, 128 Wn.App. at 863-864 (citations omitted).

The facts from the case at bar are similar to those in *Hopkins*. First, in the case at bar as in *Hopkins* the deputies actions' in stopping and detaining the defendant were based upon an anonymous informant's 911 call. Second, in the case at bar as in *Hopkins*, the deputies had the informant's first name and telephone number but they failed to call the informant prior to making the stop. Third, in the case at bar as in *Hopkins*, the deputies simply assumed the validity of the informant's information.

In this case the state may claim that the informant's statement that the defendant had been bragging about robbing a restaurant provided the missing indicia of reliability. However, any such argument must fail because the fact of the matter was that the robbery had been reported in the news media earlier in the day. Thus, the informant was not providing any information that was not already known to the general public. In the same manner that the police' actions detaining the defendant in *Hopkins* violated the defendant's right to privacy under Article 1, § 7, and United States Constitution, Fourth Amendment, so the deputies' actions detaining the defendant in the case at bar violated the defendant's right to privacy. As a result, the trial court erred when it refused to suppress the fruits of the illegal

detention, which in this case was the defendant's subsequent statements to the police.

IV. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE POLICE TOLD HIM THAT HE COULD NOT HAVE THE HELP OF AN ATTORNEY UNLESS HE WAS FIRST ARRESTED AND TAKEN BEFORE A JUDGE.

The United States Constitution, Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, Washington Constitution, Article 1, § 9 states that "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In order to effectuate this right, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant's "custodial statements" may be admitted as substantive evidence, the state bears the burden of proving that prior to questioning the police informed the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be

appointed to him." *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogation." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "'any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

In *Rhode Island v. Innis*, *supra,* the court explained the following concerning the definition of the term "interrogation":

We conclude that the *Miranda* safeguards come into play

> whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. at 300-302 (footnotes omitted).

In the case at bar the deputy who informed the defendant of his *Miranda* rights at the beginning of the audio recording specifically misinformed the defendant about his right to counsel during questioning, as opposed to after the filing of a charge. This exchange went as follows:

> DEPUTY DENNISON: Okay. Do I have your permission to record this statement?
>
> MR. MAYER: Yes.
>
> DEPUTY DENNISON: Okay. And so you see the tape recorder sitting there and everything's –
>
> MR. MAYER: Yep.
>
> DEPUTY DENNISON: – okay, right? Has anyone made any

threats or promises to you regarding this statement?

MR. MAYER: No.

DEPUTY DENNISON: Okay. So, you (inaudible). I read you your Miranda prior to it, but now that we're on - on recording, I'm going to read it to you again, okay? You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights as I've explained them to you?

MR. MAYER: Yes. Um, If I wanted an attorney and I can't afford one, what – what would – ?

DEPUTY DENNISON: If you wanted an attorney – you know, if you were charged with a crime and arrested, if you wanted an attorney and couldn't afford one, the Court would be willing to appoint you one. Do you want me to go over that with you again?

MR. MAYER: Yeah, but how would that work? Will you be – how it – how I –

DEPUTY DENNISON: You're not under arrest at this point, right?

MR. MAYER: Oh, okay. Okay.

DEPUTY DENNISON: So, if you were, then you would be taken to jail and then you'd go before a judge and then he would ask you whatever at that point, if you were being charged, you would afforded an attorney if you couldn't hi – you know, if you weren't able to afford one.

MR. MAYER: All right. I understand.

DEPUTY DENNISON: Understand?

> MR. MAYER: Yeah.
>
> DEPUTY DENNISON: Okay. So you do understand your rights?
>
> MR. MAYER: Yes.
>
> DEPUTY DENNISON: Keep your rights in mind. Do you want to explain to us or talk to us about – all right, you know, I told you why you're here. There was a robbery at the – at KC Teriyaki and your name has come up. So, keeping your rights in mind, do you want to talk to us about it?
>
> MR. MAYER: Okay.

RP 78-80.

The substance of the deputy's answers to the defendant's question about how he could get an attorney if he didn't have any money were unequivocal and completely wrong. His answer to the defendant's question, and the defendant's request that he again explain the point, was that (1) you are not under arrest, (2) you only get a court-appointed attorney if you are first arrested, taken to jail, and then taken before a judge. In this case the court attempted to get around this obvious error by finding that the deputy was confused about just what the defendant was asking. The court concluded as follows in its findings of fact from the CrR 3.5 hearing:

> 25. After indicating that he understood his rights, Nicholas asked Deputy Dennison how he would go about getting an attorney if he could not afford one.
>
> 26. Deputy Dennison thought Nicholas' question pertained to the procedures for getting an attorney appointed by the Court after being

> arrested, and explained the process to Nicholas.

CP 485.

Exactly how Deputy Dennison could have believed that the defendant was asking about how he could get an attorney "after being arrested" is difficult to comprehend. At that point he had just read the defendant his *Miranda* rights for the second time and was specifically asking him if he understood those rights. The *Miranda* rights the officer had just read and repeated to the defendant included the following statement:

> You have the right at this time to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish.

RP 78-79.

This warning specifically refers to the defendant's rights to have an attorney present "while you are being questioned" and the right to an appointed attorney "before questioning." How the deputy could have immediately jumped from the defendant asking how he could get an attorney if he wanted one to a conclusion that the defendant was somehow asking about the procedures for the appointment of an attorney after arrest, booking, and appearance in court is hard to understand. However, the Deputy so testified and it was within the court's province as the finder of fact to accept the Deputy's claim regardless of how improbable. Thus, the defense

concedes that substantial evidence supports these two findings of fact.

While substantial evidence supports these two findings, ultimately that fact is irrelevant. The reason is that the deputy's subjective belief as to what the defendant was asking is irrelevant. The relevant issue under *Miranda* and the many decisions interpreting it is whether or not the deputy properly informed the defendant of his right to a court-appointed attorney prior to questioning. Although the officer did initially give such an advice of rights, he then refuted his own statement by telling the defendant that he only had the right to an attorney after arrest, after booking, and after appearance in court. Thus, under the facts of this case the trial court erred when it admitted the defendant's statements made during custodial interrogation because Deputy Dennison's statements, when taken as a whole, did not properly inform the defendant of his right to an attorney prior to questioning.

As with other constitutional rights, a defendant denied the right to silence under either the state or federal constitution is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not "harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists

when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In the case at bar a review of the evidence and lack of evidence reveals that the admission of the defendant's confession was not harmless beyond a reasonable doubt as to the first degree burglary and first degree robbery charges. The reason is that there was absolutely no physical evidence or disinterested eyewitness testimony that linked the defendant to the burglary/robbery at KC Teriyaki. Rather, the majority of the evidence on these charges came from claims made by compromised witnesses who had motive to lie about the defendant's involvement in order to divert their own level of culpability. While this evidence was more than sufficient to sustain a guilty verdict, it was not sufficiently overwhelming to make the erroneous admission of the defendant's custodial confession harmless beyond a reasonable doubt. As a result, the defendant is entitled to a new trial on the first degree burglary and robbery charges.

V. THE TRIAL COURT'S DECISION TO ALLOW A KEY STATE'S WITNESS TO VOUCH FOR HER OWN CREDIBILITY DENIED THE DEFENDANT HIS RIGHT TO HAVE A FAIR AND IMPARTIAL JURY BE THE SOLE JUDGE OF THE FACTS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right

to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment, or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the

jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

> Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. At the trial the defendant testified and claimed self defense. During cross-examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the

statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

> It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he

> may possess under the guise of cross-examination, as in this case.
>
> * * *
>
> To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

> A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

In the case at bar, the court, over defense objection, allowed the state to present its own opinion to the jury that Emily Mayer was telling the truth in her testimony. The presentation of this evidence came at the end of her direct testimony and included the following:

> Q. Could you read that paragraph right there, please?
>
> A. "The parties stipulated the – stipulate the defendant will be in breach of this agreement if the defendant makes any statement at

any interview, hearing, or trial that is not completely truthful."

Q. Okay. And what is your understanding if you were found to be untruthful in your testimony?

A. That I would not have a plea bargain.

Q. And that you would be back to square one?

A. Yes.

Q. So, your agreement is premised upon you testifying truthfully?

A. Correct.

Q. Now, when was the last – I mean, correction: when was the first time you told the police what had happened?

A. When I was arrested on February 11th. It was probably about 6:00 in the morning at that time that I made a statement.

Q. Okay. And is that statement consistent with your testimony today?

A. Yes.

MR. SOWDER: Objection. The consistency calls for an opinion, but they can compare the statements.

MR. VU: Her impeachment, she's –

JUDGE JOHNSON: Overruled.

RP 831-833.

The primary purpose of this testimony was not necessarily to get the jury to believe that Emily Mayer was telling the truth because she claimed she was. Rather, the primary purpose of this testimony was to let the jury

know that it could rely upon her testimony because the state was verifying its truthfulness through its continued agreement with her. In other words, the purpose of this evidence was to assure the jury that the Clark County Prosecutor's Office believed her testimony was truthful. Thus, by allowing this evidence, the court violated the defendant's right to have the jury determine the credibility of witnesses.

This error in allowing this evidence was far from harmless in this case. Of all the state's witnesses, Emily Mayer was the one who provided the most damning evidence against the defendant. She was the link between the defendant and the burglary at the Lies' residence and she was the primary link between all of the evidence the police found at her residence and the defendant. Thus, by allowing the state to improperly bolster her credibility, the court denied the defendant a fair trial.

VI. THE TRIAL COURT'S REFUSAL TO GRANT THE DEFENSE A CONTINUANCE IN ORDER TO EMPLOY AN EXPERT TO EVALUATE AND COUNTER LAST MINUTE DNA EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, all defendant's in criminal cases are entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). At a minimum, this includes

the right to counsel who had adequate time to prepare a defense. *Welfare of J.M.*, 130 Wn.App. 912, 922, 125 P.3d 245 (2005). The trial court's failure to grant a continuance to counsel who is unprepared to present a defense not only constitutes an abuse of discretion, but it also denies a defendant effective assistance of counsel. *Id.*

For example, in *In re R.R.*, 134 Wn.App. 573, 141 P.3d 85 (2006), a father appealed the termination of his parental rights, arguing that the trial court's failure to grant his attorney's motion for a continuance in order to adequately prepare for trial denied the father effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In this case, the state filed a petition to terminate a father's parental rights. The day before trial, the court appointed an attorney to represent the father. This attorney immediately contacted the Assistant Attorney General (AAG) who represented the state. The AAG agreed not to oppose the attorney's motion to continue the trial in order to adequately prepare a case.

However, the next day the defendant failed to appear at the trial, and the AAG opposed the continuance. In spite of the fact that the attorney had spoken with the father and informed the court that his client was absent because he missed the bus, the court denied the motion to continue and insisted that the attorney proceed with no preparation. Following trial, the

court granted the petition to terminate and the father appealed, arguing ineffective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Fourteenth Amendment. The Court of Appeals agreed with this argument and reversed. The court held:

> Nelson received no discovery, had no opportunity to review the documents identified by DSHS in the Notice of Intent to Admit, and had no opportunity to interview the witnesses listed by DSHS or to obtain an independent evaluation of Ramsey. As Nelson explained to the court:
>
> > I am unable and would not do an opening statement and would not do any cross examination.... My professional duty would not permit me to go forward on a case that I was just appointed yesterday. I have not received any discovery, haven't spoken with any witnesses, haven't received a witness list, have received absolutely nothing. So I will be here. However, I don't believe that I could adequately represent Mr. Ramsey under these circumstances.
>
> Under either the fair hearing standard in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), or the meaningful hearing standard in *Moseley*, 34 Wn.App. 179, 660 P.2d 315 (1983), Nelson could not provide effective assistance of counsel without additional time to prepare. *In the Matter of the Welfare of J.M.*, 130 Wn.App. 912, 922, 125 P.3d 245 (2005). We conclude the trial court's decision to deny the motion to continue the termination trial deprived Ramsey of the right to effective assistance of counsel and was an abuse of discretion.

In re R.R., 134 Wn.App. at 585-586.

In the case at bar, trial counsel was also unprepared to proceed to trial because he did not have time to obtain an expert to evaluate the last minute DNA evidence the state produced. Trial counsel stated the following

concerning the circumstances surrounding his need for a continuance:

> At the readiness hearing on October 4, 2012, Defendant requested a continuance in the trial. The basis of the continuance was untimely discovery as Defendant argued and the motion set forth. The untimely discovery was DNA test results and the DNA lab file which left counsel with insufficient time to obtain an expert. The frist laboratory report defense received was on August 6, 2012. In the report it concluded Defendant alleged DNA on a pistol said to have been part of the robbery was "inconclusive." Since the defendant was not going to contest the result it was not pursued further. However, in a report dated September 20, 20-12 and counsel receiving the report after that date, the state's DNA analysis further showed a bandana allegedly used in the robbery had a matching profile of Defendant's DNA at the level of 1 in 5 quintillion on part of the bandana, 1 in 3,700 individuals DNA profile on another area of the bandana and I in 17 million in a third area of the bandana. Defendant wanted to contest the results but he didn't receive the discovery of the actual lab file until after September 27, 2012.
>
> Defendant needed additional time to have his expert, Dr. Raymond Grimsbo of Intermountain Forensics review the state's procedure for accuracy in its DNA analysis and to obtain an expert on the probability of the matching profile the state suggested existed, such as Dr. Bruce Weir, of the Biostatistics Laboratory University of Washington Medical School.
>
> This gave counsel approximately eight days, before readiness hearing, to find an expert able to examine the report, send the data to the expert, get a report back, provide the results to the prosecutor, and be prepared to start trial. Deeming this to be an impossible task counsel requested a continuance at the readiness hearing as described above. The motion for continuance was denied.

CP 326-327.

These statements by defendant's trial counsel reiterated counsel's claims made in his original written motion to continue. CP 524-530. As is apparent from counsel's statements, the late production of this critical DNA

evidence left counsel unable to adequately respond to what ended up being the state's only physical evidence that connected the defendant to the robbery. Thus, the court's refusal to grant the continuance denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and caused him prejudice. As a result, this court should reverse the defendant's conviction on the robbery and first degree burglary charge and remand for a new trial.

CONCLUSION

The defendant's conviction for first degree burglary should be dismissed for want of substantial evidence. The remaining convictions should be vacated and remanded for a new trial based upon (1) the trial court's erroneous denial of the defendant's suppression motion, (2) the trial court's erroneous admission of the defendant's statements made during custodial interrogation given in violation of the defendant's right to silence, (3) the trial court's erroneous decision to allow the state to comment on the credibility of one of its key witnesses, and (4) denial of effective assistance of counsel flowing from the trial court's refusal to grant the defense a continuance in order to address last minute DNA evidence. In the alternative, this court should vacate the robbery charge and remand for a new trial based upon the trial court's submission of a "to convict" instruction that included an alternative method of committing the offense that was not supported by substantial evidence.

DATED this 8th day of July, 2013.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION,
FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.52.010(5)
Definitions

(5) "Enters or remains unlawfully." A person "enters or remains unlawfully" in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land. A license or privilege to enter or remain on improved and apparently used land that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner.

RCW 9A.52.020
Burglary in the First Degree

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

INSTRUCTION NO. 20

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 9, 2012 the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building, the defendant or an accomplice in the crime charged was armed with a deadly weapon; and

That any of these acts occurred in the State of Washington.

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

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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. NICHOLAS KEITH MAYER, Appellant.	NO. 44232-9-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On July 8th , 2013, I personally placed the United States Mail and/or e-filed the following documents to the indicated parties:

1. BRIEF OF APPELLANT

Nicholas K. Mayer #363038 Coyote Ridge Correction Center P.O. Box 769 Connell, WA 99326-0769	Anne Mowry Cruser Deputy Prosecuting Attorney PO Box 5000 Vancouver, WA 98666-5000

Dated this 8th day of July, 2013, at Longview, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays
Attorney at Law

HAYS LAW OFFICE

July 08, 2013 - 4:14 PM

Transmittal Letter

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Case Name: State vs. Mayer

Court of Appeals Case Number: 44232-9

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Motion: ____

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Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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Personal Restraint Petition (PRP)

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Comments:

No Comments were entered.

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