73654-0

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Court of Appeals
Division I
State of Washington

NO. 73654-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES ELLIS THOMAS,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

ANDREW E. ALSDORF
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUE

Was an officer's testimony that the defendant's denials of shoplifting "weren't believable" so prejudicial that the court's immediate curative instruction did not cure the error, when the defense conceded throughout the trial that the defendant did commit shoplifting?

II. STATEMENT OF THE CASE

A. THE ROBBERY.

A jury convicted the defendant of First Degree Robbery based on his actions at an Everett Fred Meyer store on December 14, 2013. At around 7:00 PM, the defendant drew the attention of Fred Meyer loss prevention officer Patti Owens by removing his backpack while shopping in the hardware section. She saw the defendant select three packages of flashlights and use a multi-tool from his pocket to open the plastic packaging surrounding one of them and remove the security tags from the other two. RP 141-144.[1]

[1] The evidentiary portion of the jury trial occurred on March 16-17, 2015, and was transcribed as two consecutively paginated volumes. For clarity, citations to that portion of the record will refer to "RP," while references to the record occurring on any other date will include an additional reference to the date of the hearing; for example, "3/18/15 RP."

The defendant moved to the shoe department where he tried on a new pair of mostly black Fila running shoes with red letters and red soles. After trying on the shoes he used the same multi-tool to cut the security tag off of the shoes, which he accomplished by cutting the shoe itself instead of cutting the security tag's looped cable. He then placed the all-black shoes he had been wearing inside the empty Fila box and continued shopping while wearing the new Filas. RP 145-146. He inflicted the same type of damage to remove the security device from a pair of girls' sneakers before placing that pair in his backpack and hiding the empty shoe box in the bedding section of the store. The defendant then moved to the grocery section where he placed a gallon of milk and two packages of hot dogs into his shopping cart. He avoided all of the cashier stations at the front of the store and moved his cart toward the exit without making any attempt to pay for the items. RP 147-150.

Much of Patti Owens' testimony was corroborated by a DVD (Exhibit 1) containing portions of video surveillance footage Ms. Owens selected from among the 80 security cameras used throughout the store. RP 121, 152-154. The video clearly shows the defendant trying on the red and black Fila shoes and leaving them on while he places his original all-black shoes in the Fila box. Ex. 1,

Shoe 7:27:58-7:31:11[2]; Ex. 16; RP 155-157. The video also shows the defendant leaving the store with Ms. Owens following close behind. Ex. 1, FOD Entrance / Exit 7:48:55-7:49:03.

As soon as the defendant had fully exited the store, Ms. Owens identified herself as a loss prevention officer and accused him of taking merchandise without paying for it. Her colleague Patric Trattles was already aware of the situation and was standing very close to them. RP 158-159. While outside the store Ms. Owens grabbed the defendant's backpack (and the stolen merchandise it contained) before instructing him to push his shopping cart back inside Fred Meyer. Once the defendant got back inside the store he pushed the cart away and said, "You can have the stuff, I'm leaving." The defendant was still wearing the stolen red and black Fila shoes, however, and he began demanding that Ms. Owens return his backpack. Ms. Owens was unwilling to return the backpack because it still contained stolen merchandise. RP 159-161. The defendant then maneuvered

[2] State's Exhibit 1 contains, in addition to the video surveillance footage, a copy of the proprietary software used by Fred Meyer to play the footage. There are three separate video files contained in the exhibit, which cumulatively provide 4 different camera angles of the incident. The State's citations to Exhibit 1 will include references to the camera angle and the timestamp of the relevant footage, each of which can be reviewed by selecting the referenced camera angle and timestamp from within the proprietary software.

around the two loss prevention officers and ran out of the store. RP 159-162; Ex. 1 FOD Entrance / Exit 7:49:20-7:49:55.

Back outside the store, the defendant exchanged words with Mr. Trattles but soon started to walk away from the scene. RP 300-302; Ex. 1 East Lot Ptz 7:49:57-7:50:27. He then abruptly turned back around and approached Ms. Owens at a fast pace, a gesture both employees perceived as threatening. RP 164-165, 230, 303. The defendant appeared intent on physically approaching Ms. Owens, who still held his backpack full of stolen goods, but Mr. Trattles positioned himself between the two. The defendant repeatedly bumped into Mr. Trattles' chest throughout this portion of the confrontation. RP 303-305; Ex. 1, East Lot Ptz 7:50:27-7:51:10. The defendant told Mr. Trattles, "I'm going to knock your ass out," then adopted a "boxer's stance" with his hands closed into fists. RP 305-306. The defendant swung his right arm toward Mr. Trattles' face, so fast that Mr. Trattles barely had enough time to deflect the blow with his own hand. The defendant's punch struck three fingers on Mr. Trattles' hand, causing the fingers to bend back. He experienced pain and numbness in his fingers as a result of the defendant's punch. On a scale of one to ten, Mr. Trattles estimated the strength of the defendant's punch at "about an eight."

The defendant told Mr. Trattles, "I hit you, I hit you," before he heard the approaching police sirens and left. RP 306-307; Ex. 1 East Lot Ptz 7:51:10-7:51:41.

Everett Police officers soon located the defendant under an overpass, just three blocks away from Fred Meyer. He had a pair of wire cutters and a box cutter on his person. RP 266-267. He was still wearing the stolen, damaged, red and black Fila shoes. RP 254-255; Ex. 16. Police drove the two loss prevention officers to the defendant's location. They both identified the defendant as the robber. RP 268.

After waiving his Miranda rights, the defendant told Officer McCourt that he had not even been to Fred Meyer that day. He explained his wire cutters and box cutter as tools he used earlier in the day to work on his truck. He said that he took a bus from his truck's location back to his home in Everett. When Officer McCourt directly confronted the defendant about the shoes he was wearing, the defendant said that his girlfriend picked them up about two weeks prior. RP 269-271.

The defendant was transported back to Fred Meyer in Officer Michael Keith's patrol car. When Officer Keith removed the defendant from his vehicle back at Fred Meyer, he noticed that the

defendant was no longer wearing the red and black Fila shoes. Instead he was only wearing socks. The stolen shoes were on the floorboard in the back seat of the patrol car. Officer Keith asked the defendant why he wasn't wearing the shoes anymore, but the defendant said he didn't know what Officer Keith was talking about. The defendant insisted not only that he had been wearing white tennis shoes that night, but also that the police must have planted the red and black ones. RP 255-257.

B. THE DEFENDANT'S TRIAL STRATEGY AND OFFICER MCCOURT'S TESTIMONY.

Defense counsel's opening statement began with a concession that "this is a case of shoplifting, no more." While acknowledging that the defendant stole items from Fred Meyer, he asserted "there is reasonable doubt that no force or threat of force was used by my client against anyone there at Fred Meyer." RP 137. The opening statement did not assert that the defendant was not at Fred Meyer on the night in question, or that the black and red Fila shoes were not stolen but rather a gift from his girlfriend. Neither did the statement assert that the evidence would demonstrate a faulty or incomplete police investigation. RP 137-139.

The State called four witnesses; the two loss prevention officers and the two police officers. The first witness, Ms. Owens, testified for more than two hours and was the only witness to testify on the first day of trial. RP 140-233. The last witness, Mr. Trattles, testified for more than 1¼ hours. RP 287-349. In between those two witnesses the jury heard 17 minutes of testimony from Officer Keith, followed by 15 minutes of testimony from Officer McCourt. RP 252-263, 264-275. The cross-examination of Officer McCourt was only three minutes long and included 5 questions suggesting that he could have done more to investigate the defendant's side of the story. RP 273-275. In response, the prosecutor's redirect examination contained the following exchange which has become the sole issue on appeal:

> Q: As far as counsel asked you about checking on the bus, checking on the address, checking on the girlfriend, why didn't you do those things?
>
> A: They – honestly, they weren't believable.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained. The jury will disregard that answer.
>
> [PROSECUTOR]: Your Honor, could we address that outside the presence?

THE COURT: Yes.

RP 275. The prosecutor accepted the court's ruling "with regard to how that was answered," but also argued that the subject matter was a fair response to the theme of the cross-examination. After a brief discussion outside the presence of the jury the court allowed the following testimony, which the jury heard without objection:

> Q: Officer McCourt, did you make a decision not to follow up on the information the defendant provided you?
>
> A: Yes.
>
> Q: When did you make that decision?
>
> A: It was at the time when Officer Keith was getting Mr. Thomas out of the back of his patrol car.
>
> Q: And was it based on something you heard at that point?
>
> A: It was based on something I heard and saw, yes.
>
> Q: And what was that specifically? What did the defendant say or do at that point that made your decision not to follow through?
>
> A: The defendant said that the shoes were not his, and he was wondering what we had done with his actual shoes.
>
> Q: And was that inconsistent with what he had told you earlier?
>
> A: Yes.
>
> Q: How was it inconsistent?

> A: He'd said the black and red Fila shoes that he was wearing were obtained by his girlfriend a few weeks – or a couple weeks prior.

RP 280-281.

The defense elected not to call any witnesses. RP 352. Prior to closing argument the court approved the defendant's request to instruct the jury on the lesser included crimes of second degree robbery and third degree theft. CP 63; RP 376.

Defense counsel conceded in closing argument that the defendant stole shoes from Fred Meyer:

> A shoplifting occurred. Yeah. Yeah. I told you that at opening statement. I never denied it. And you've seen the evidence now and I'm sure you'll agree. He took a pair of shoes that didn't belong to him.

3/18/15; RP 34.

The theme of the defendant's closing argument was that the case was overcharged and that there was insufficient evidence of force or threats to sustain a robbery conviction. He told the jury that the evidence "points to not guilty on robbery and guilty of a simple shoplifting." 3/18/15; RP 48. Defense counsel did not argue that Officer McCourt should have conducted a more exhaustive or thorough investigation into the defendant's explanations about the stolen shoes or his whereabouts earlier in the day. 3/18/15; RP 32-

49. Instead he argued that the resources law enforcement had already expended on the case represented a "boondoggle. . . an exercise in futility . . . a waste of time . . . a waste of your money as taxpayers." 3/18/15; RP 33.

The jury deliberated over the lunch hour for 98 minutes before returning a verdict of guilty to First Degree Robbery. __ CP __ (sub #53, Jury Trial Minutes at 10); CP 44.

C. MOTION FOR NEW TRIAL AND SENTENCING.

At the sentencing hearing on April 14, 2015, the defendant brought a motion for new trial pursuant to CrR 7.5. 4/14/15; RP 3. The defendant raised two issues: that Officer McCourt's testimony improperly commented on the credibility of the defendant, and that the court incorrectly admitted evidence that the defendant possessed a box cutter and wire cutters during the incident. CP 37-41.The State's written response highlighted the defense strategy of seeking a third degree theft conviction rather than a robbery conviction, then placed Officer McCourt's disputed testimony into the context of a trial where use of force, not theft, was the only contested issue. The State argued that the defendant and Officer McCourt never discussed threats or use of force. Rather, they only discussed issues related to the uncontested theft of the Fila shoes,

such as the defendant's initial denial that he was at Fred Meyer at all, that the Fila shoes were a gift from his girlfriend, and finally (after the defendant removed them) that the shoes were not his and had been planted by the police. CP 30-31.

The court denied the motion for new trial, relying in part on State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). Regarding Officer McCourt's testimony that he did not believe the defendant's various denials of theft, the court found it significant that the prosecutor did not "[bring] this out intentionally as a comment on the credibility of a witness," that it occurred during redirect examination, and that the jury was immediately instructed to disregard the testimony. 4/14/15; RP 12.

The court announced its intent to impose a low end 108 month sentence, but delayed signing the judgment and sentence until May 21st, allowing the defendant more than a month to turn himself in on a class A felony conviction. The court warned the defendant, "If you don't turn yourself in on the report date, you're going to get the high end." 4/14/15; RP 31, 34. The defendant failed to appear on May 21st, so the court issued a no bail warrant for his arrest. __ CP __ (sub #78 – Order Determining Probable Cause and Directing the Issuance of a Warrant). The warrant was served

on June 15th, but not before the defendant assaulted a police officer by twice throwing a bicycle at him. CP 18-21. On June 25th, 2015, the court imposed a 144 month high end sentence.

III. ARGUMENT

A. STANDARD OF REVIEW.

The defendant has assigned error to precisely one decision made by the trial court - the decision to deny his motion for a new trial pursuant to CrR 7.5. Br. App.1. Denial of a motion for new trial is reviewed for an abuse of discretion. State v. Perez-Valdez, 172 Wn.2d 808, 819, 265 P.3d 853 (2011). An abuse of discretion will be found only when no reasonable judge would have reached the same conclusion. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

B. ALTHOUGH OFFICER MCCOURT GAVE AN IMPROPER OPINION, THE DEFENDANT OPENED THE DOOR TO QUESTIONING ABOUT THE OFFICER'S REASONS FOR CONDUCTING A LIMITED INVESTIGATION.

Generally, no witness may offer testimony in the form of an opinion regarding the defendant's guilt or veracity. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). "Opinion testimony" has been defined as "testimony based on one's belief or idea rather than on direct knowledge of facts at issue." Id. at 760. Such testimony may be reversible error because of its potential to violate

the defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. Id. at 759.

On the other hand, testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt. City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Washington courts have declined to take an expansive view of claims that testimony constitutes an opinion on guilt. Demery, 144 Wn.2d at 760.

The improper testimony of a police officer raises additional concerns because "an officer's testimony often carries a special aura of reliability." But even when that happens, jurors are presumed to follow trial courts' curative instructions to ignore improper opinion evidence; thus, efforts to describe these errors as invading the province of the jury may often be "simple rhetoric." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125, 131 (2007).

A five-factor and case-specific test helps determine which expressions of opinion are truly of constitutional magnitude. The test to determine whether a statement constitutes improper opinion testimony requires consideration of the type of witness, the specific

nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

Although the State concedes that the trial court correctly struck Officer McCourt's improper opinion from the record, the opinion did not create reversible error because the door was opened by the defendant and the court immediately issued a curative instruction.

A similar situation occurred in State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012). That case was a prosecution for three counts of aggravated first degree murder in which the defendant reportedly found both of his parents and his sister bludgeoned to death inside the family home. Multiple officers made observations which were arguably inconsistent with what one might expect from someone who had just discovered that his family members were victims of a gruesome tragedy.

One of the detectives in the Rafay case testified that he encouraged the defendant to contact other family members about funeral arrangements for the victims, but the defendant rejected that advice. Instead of calling family members, the detective said the defendant was "just chillin' with his buddy." The trial court

instructed the jury to disregard that answer, but then allowed a more detailed description without any objection: "They had gone to Barnes & Noble, they had sat around and read, and then that was just it. He was not attending to any of the business that I think you need to attend to after the death of a family." Id. at 809.

The same detective also told the Rafay jury about an experiment he conducted to test the defendant's claim that he saw blood spatters near his deceased father even though the room was dark at the time. The court allowed the jury to consider why the detective felt this experiment was important: "I wanted to personally view what he said he did and then weigh what he was saying to me. Was it accurate or inaccurate or was it fabricated or not?" The detective recreated the lighting conditions for himself, then testified that "I personally could not see the detail that he was talking about." Only the detective's further conclusion, "I don't believe he saw what he said he saw," was stricken by the trial court. Id. at 810.

In Rafay this Court found it significant that the jury had substantial evidence about each of the issues upon which the detective had offered his own opinions, finding that the opinions did not "inject any new issues or details" and that the prompt curative instructions, combined with the instruction that the jury is the sole

judge of credibility, allowed the jury to decide the facts "solely on the evidence properly admitted." Id. at 811.

Much like the jury in Rafay, the jury in this case had substantial evidence to draw their own conclusions about whether the defendant's explanations and denials made to Officer McCourt were believable. Even more important, none of the defendant's statements to Officer McCourt had any bearing on the sole contested issue at trial; whether the defendant threatened or used force as required to elevate shoplifting into robbery. For example, the jury was able to see the defendant on Fred Meyer's video surveillance and two loss prevention officers identified the defendant on scene and in court. See Ex. 1; RP 141, 294. The defendant's entire trial strategy was based on admitting that the defendant was not only present at Fred Meyer, but actively engaged in shoplifting as well. 3/18/15 RP 32-49. With that knowledge the jury must have had little difficulty determining that the defendant lied to Officer McCourt when he denied setting foot inside Fred Meyer that day. See RP 269. Officer McCourt's opinion did not inject any new issues or details; the defendant had already abandoned any attempted alibi defense on his own.

Similarly, the defendant's explanation about where he got the stolen black and red Fila sneakers was easy enough for the jury to discount even without Officer McCourt's stricken testimony. The defendant told Officer McCourt that his girlfriend bought him the shoes a few weeks prior to the incident. RP 271. But his own attorney said he stole the shoes. 3/18/15; RP 34 ("He took a pair of shoes that didn't belong to him.") Even on the night of the incident the defendant soon contradicted his description of the shoes as a gift from his girlfriend; when removed from a patrol car wearing only socks, with the stolen shoes conspicuously remaining on the patrol car's rear floorboard, the defendant said he had never seen them before and the police must have planted them. RP 257-258. Again, the defendant revealed himself as untruthful well before Officer McCourt admitted to the jury that he had reached the same conclusion.

Finally, in this case determining whether the defendant was truthful with the police was a simple matter of knowing the difference between black and white. The defendant claimed he had been wearing white tennis shoes on the night of the incident, but the video, photographs, and witness testimony all proved that he wore black shoes before he stole the black and red ones. Compare

RP 257 ("He went on to explain that the shoes that he had been wearing that night were white tennis shoes...) with RP 146 (...[H]is shoes were all black.); Ex. 18-20; Ex. 1, Shoe 7:27:57-7:31:06. The jury received all of this evidence, and therefore must have determined on its own that the defendant had lied at least about the color of his shoes.

C. THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT DUE TO UNCONTROVERTED, OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT.

Applying the five-factor test set forth in Montgomery confirms that although Officer McCourt's "unbelievable" comment was improper, it had no chance of affecting the jury's verdict in this case. Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213, 218 (2014).

The State concedes that the first factor, the type of witness involved, weighs in favor of finding Officer McCourt's testimony improper.

The specific nature of the defendant's statements, which Officer McCourt found unbelievable, dealt exclusively with the defendant's presence at Fred Meyer and his alleged theft of shoes.

Both of these issues were conceded by the defendant in opening statement and again in closing argument. RP 137; 3/18/15 RP 34. Therefore the defendant's statements, and whether Officer McCourt believed them or not, had no bearing on the sole contested issue at trial – whether the State had proved beyond a reasonable doubt that the defendant used "force or threat of force...against anyone there at Fred Meyer." RP 137.

For this reason the second, third, and fourth Montgomery factors ("the specific nature of the testimony," "the nature of the charges," and "the nature of the defense") should all be considered together and resolved against a finding that the improper opinion resulted in incurable prejudice. Officer McCourt's personal belief about issues that ultimately were uncontested at trial had no potential to affect the verdict. The defendant never testified or presented any evidence of his own, so there is no chance that Officer McCourt's opinion affected the jury's assessment of other facts alleged by the defendant. The officer's disbelief was limited to discreet issues which the defendant chose to concede as a matter of trial strategy.

Any potential for damage to the jury's perception of the evidence was immediately cured by the trial judge, who *sua sponte*

instructed the jury to disregard the answer as soon as it was uttered. RP 275. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The fifth Montgomery factor is "the other evidence before the trier of fact." 163 Wn.2d at 591. This factor allows the court to consider the overwhelming evidence of the defendant's guilt, as required in a harmless error analysis. While it was improper for Officer McCourt to offer his personal opinion about the credibility of the defendant's abandoned alibi and claim of title to the stolen property without providing factual support for his opinion, the testimony immediately following the improper remark provided that factual support without any objection from the defendant. RP 280-281. This portion of the record shows that Officer McCourt's opinion was not based in emotion, nor were his investigatory decisions based on sloth or incompetence. They were instead based on a rational observation of facts already before the jury.

Specifically, both Officer McCourt and the jury knew that both of the defendant's claims about the shoes could not be true; it is not possible that the shoes were both a gift from his girlfriend, yet at the same time the defendant had never seen them before and

the police must have planted them in the patrol car. Exposing this fact-based inconsistency was far more damaging to the defendant's credibility than one officer's opinion about the same inconsistency.

Again, the only contested element in this case was whether the defendant used or threatened to use force in order to obtain or retain the property his attorney conceded that he stole, and whether the defendant inflicted bodily injury in the process. CP 56; RP 137. The evidence overwhelmingly supported a use of both force and threats of force. Both loss prevention officers testified to feeling threatened, the defendant punched Patric Trattles in the hand, and Patric Trattles' injury was not only painful but impaired his use of that hand for 6 to 8 hours. RP 164-165, 230, 303, 306-307, 312; Ex. 1 East Lot Ptz 7:51:10-7:51:41. The defendant presented no evidence to the contrary. The defendant's statements which Officer McCourt found unbelievable did not relate to the physical struggle that resulted in Mr. Trattles' injured hand. The jury learned that Officer McCourt had factual support for his personal opinion. On this record the error was unquestionably harmless because it could not have affected the jury's evaluation of the uncontroverted evidence.

D. THE DEFENDANT HAS THE ABILITY TO PAY APPELLATE COURT COSTS.

The defendant's trial counsel became well acquainted with the defendant over a period exceeding two years. He provided the following assessment of the defendant's prospects for becoming a productive member of society following his sentence:

> "Mr. Thomas is a literate man, he has a passion for reading and knowledge. He always has a courteous attitude. He is a veteran of the Marine Corps and was honorably discharged in 1979. He is a skilled worker. He worked for a company subcontracted with Boeing, machining aircraft parts for many years. He is also an experienced electrician. He was married until his wife passed away in 1998 and he chose not to remarry. He is a dynamic individual."

__ CP __ (sub #22 in Snohomish County Superior Court case 15-1-01427-1, Defendant's Presentence Memorandum and Recommendation at 5-6). This is strong evidence that the defendant will have the ability to pay, or at least the skills to develop an ability to pay, appellate court costs upon his release.

While the defendant points to the Order of Indigency signed by the trial court, it is important to remember that such orders are routinely entered on an ex-parte basis and are usually supported only by the convicted felon's unverified declaration about his own financial situation. The procedural posture in which the declaration

is made creates a built-in incentive for defendants to provide an incomplete picture of their finances and their skills. Neither the Superior Court nor the prosecutor's office devotes any significant time or resources towards verifying the facts alleged in a defendant's declaration supporting a request for indigency. In this case the defendant's declaration about his financial situation contains no numerical figures, is completely uncorroborated and entirely self-reported. __ CP __ (sub # 90 Motion for Order of Indigency – Criminal Case at 1-2).

There is good reason to doubt the defendant's financial declaration. It was signed on the same date he was sentenced to prison for committing a violent crime of dishonesty. ER 609; State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996). In any future trial the jury will likely consider his conviction for first degree robbery, a crime of dishonesty, when evaluating his credibility. This Court should not demur from considering the same fact as evidence weighing against the credibility of the uncorroborated, self-reported financial declaration underlying the Order of Indigency in this case.

IV. CONCLUSION

For the reasons stated above, the defendant's First Degree Robbery conviction should be affirmed, and appellate court costs awarded to the State. Respectfully submitted on April 25, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

ANDREW E. ALSDORF, #35574
Deputy Prosecuting Attorney
Attorney for Respondent

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THE STATE OF WASHINGTON,

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DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 25th day of April, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Thomas Kummerow, Washington Appellate Project, tom@washapp.org; and wapofficemail@washapp.org.

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

Dated this 25th day of April, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office