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

James Densmore, Petitioner,	)	Case No.: 67793-4-I
vs.	)	**STATEMENT OF ADDITIONAL GROUNDS, PURSUANT TO RAP 10.10**
State of Washington, Respondent	)	

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I, James Densmore, have received and reviewed the opening brief prepared by my attorney by my attorney. Summarized below are the additional grounds for review that not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

1.) The court err'd in denying the motion to dismiss, thereby shifting the burden of proof to the defense.

2.) The state committed prosecutorial misconduct when they admitted ER 404(b) evidence.

3.) Mr Densmore recieved ineffective assistance of counsel.

4). Mr Densmore was denied the right to be present at all stages of the proceeding

5.) Mr Densmore was denied a fair Trial due to Juror misconduct.

6.) Mr Densmore was denied Due Process because of the states delay of filing the charges and delaying the filing of the appeal.

7.) The state failed to prove all the elements of the crime of Second Degree Burglary R.C.W. 9A.52.300.

ISSUE ONE

The court violated the defendants Constitutional right under the 5th, 6th and 14th Amendments of The United States Constitution, Washington State Constitution Art. I Sec. 22. The court errored when it denied the motion to dismiss. The court inadvertently shifts the burden of proof from the prosecution to the defense. By denying the motion to dismiss and allowing testimony as to what is on the video, I have no way to challenge the testimony. Now the state has placed me in a position where the

only way I can successfully challenge the Testimony about the video is to show that I was elsewhere at the time the crime was committed. I was denied a fair trial due to the loss of the video. The Redmond Police had control of the crime scene and all the evidence there. Officer Sandin is asked how many times he watched the video.

V.R.P. vol. II page 217 Line 22;

Q: How many times would you estimate that you viewed that video while you were there at the Celtic Bayou?

A: Uh, roughly two or three times. I watched it with the owner there and then I watched it again. I took notes. Uh, and, and ...

next page 218; ... described in my police report just the, uh, description of the suspects that entered that office building -- or that office room.

The trial court failed to make the determination of when does an officer have possession of evidence. When an officer takes control of a crime scene he is in

Constructive possession of the evidence.
Which is defined as; Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.
The issue here is the officer is watching the video with the ability to rewind, fast forward and freeze frame. So this demonstrates a constructive possession. When Officer Sandin asks for a copy and the shop owner tells him he doesn't know how to make a copy.
V.R.P. vol. III page 545 Line 2;
I told the owner just save it and another officer will, will follow up and, and hopefully obtain that video.
At that point Officer Sandin exercised dominion and control, and he did it in bad faith. He knew from training the value of identity. I am asking this court to reverse and remand with instructions to dismiss with prejudice.

ISSUE TWO

The state violated the defendants constitutional rights under the 5th, 6th and 14th Amendments of the United States Constitution, Washington State Constitution Art. I Sec. 22.

The state committed prosecutorial misconduct when they admitted ER 404(b) evidence into the trial thereby violating the constitutional right to a fair trial.

Both the Washington and United States Constitution guarantee a defendant the right to a trial by an "impartial jury." This right is violated when a prosecutor engages in improper conduct and such conduct has a prejudicial effect. State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). The taint of prosecutorial misconduct is especially unfair to a defendant because the prosecutor enters a criminal trial in a dual role. Id. Not only does the prosecutor act as an advocate for the state's position, but he or she acts as a guardian of justice and fairness. Id. at 263.

In This second role, the prosecutor must:

... always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided.

We recognized that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants recieve fair trials and justice is done.

To obtain reversal of a conviction on prosecutorial misconduct, the defendant must satisfy a two prong test. State v. Brett, 126 Wn. 2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996). First the defendant must show that a prosecutor's conduct was improper. Id. Second, the

defendant must show That the conduct had a prejudicial effect. Id. Conduct has a prejudicial effect where there is a substanial likelihood that the conduct affected the verdict. Id. ... State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995). (prosecutor may not place irrelevant information before the jury which potentially prejudices the defendant); State v. Dennison, 115 Wn.2d 609, 801 P.2d 193 (1990) (prosecutor may not make comments calculated to appeal to the jury's passion and prejudice, or encourage it to rendor a verdict on facts not in evidence); State v. Belgrade, 110 Wn.2d 504, 755 P.2d 174 (1988) prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider); State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994) (prosecutor has no right to elicit testimony of criminal profiles because such evidence is highly undesirable as substantive evidence due to its inherently prejudicial nature); State v. Martin, 69 Wn. App. 686, 849 P.2d 1289 (1993)

(improper for prosecutor to argue evidence that has no basis in the record). To warrant a new trial, error must be prejudicial, that is, it must affect final result of the case and must be prejudicial to the substantial right of the party assigning it. State v. Oswalt, 62 Wash. 2d 118, 381 P.2d 617 (1963).

Due to the prosecutors misconduct and violation of the courts pretrial ruling that 404(b) evidence was inadmissible. Ms Lore did not clarify that she wanted to re-address the issue of 404(b) and chose not to.

In the V.R.P. vol. I, page 46 Line 12; The judge is asked to allow evidence that will be used for identity purposes under 404(b).

The Court: Okay. Because that, that, I mean, thats what I guess is, is the concern here is that essentially, um, the reason why this 404(b) would come in if I were to let it in is essentially on identity. I mean the, the, the, the mean -- the manner of identit--, of proof of identity is modus operandi, but I mean the

whole point is To say That iT's Mr. Densmore That did This, um, although -- I mean, thats, That's the ultimate reason for, for bringing iT in.

V.R.P. vol. I page 51 Line 16;

The Court: Well, I'm gonna deny The state's motion here. I certainly, uh, understand wh--, obviously why the state wants To put iT in here, but I just don'T Think iT meets The, The standards for iT being a modus operandi, iT being sufficiently unique That iT really provides a means of identifying who the, uh, The perpetrator is. Then in V.R.P. vol. II page 365 Line 10 The preTrial motions are readdressed for The second Trial. And iTs agreed upon That The original rulings would stand.

Also I should point out what Ms Love say's what TesTimony she would be seeking from the search warranT. V.R.P. Vol. I page 131 Line 2;

Attorney Love: Um, the fact of the investigation as iT relates To his arrest in this case would be all that I would go inTo.

The Redmond Police Department didnoT ask To

participate in the search nor did they ask that items be search for. The search warrant had nothing to do with the case at trial.

Officer Sandin was asked by Ms Love if any tools were found at the scene and he said no. Nor does he say he saw any tools being used in the video he watched.

V.R.P. vol III page 519 is Ms Love questioning of Detective Montgomery of the Snohomish County Sheriffs Office. He is testifying as to what he found in the search of my home.

Page 519 Line 5; Q: Those items, uh, being packaged up in bags, does that have any significance for you?

A: Yes, it does

Q: And what is that?

A: These are, in the way they were found, um, consistent with that of a go bag or a ready bag that, uh, one may have already established and placed. Um, and by that I mean they, they have

a certain job. In this instance these tools are all common tools of burglary, um, all use to, you know, cover their hands so there's no fingerprints, um, pry bars and screwdrivers to bust through walls or to compromise locks and doors.

Q: Now there were a number of, uh, pry bars we've looked at in this case. Wh--, what's a pry bar used for when it's used for a burglary?

A: It could be used for several different things. One of the, one thing that can be used, um, which we found consistent with these is they all had, uh, a white powdery substance as if, uh, used to break through a wall.

At this point Defense Attorney Rivas gives an ineffective objection.

V.R.P. vol. III page 530 ReRe Cross-Examination of Detective Montgomery.

Attorney Rivas: -- Detective, you don't recall because that's not what you were looking for, right? You went in there looking for what you

refer To as "burglars Tools." Correct?

A: Correct.

This shows that Detective Montgomery wasn't there for any other purpose but To back door in 404(b) evidence.

In the first Trial V.R.P. vol II page 309 Line 5 the detective is asked a question.

Q: Um, you didn't find anything, any papers, anything That said anything about The Celtic Bayou, did you.

A: I would have To say no. I don't even know what that is.

IT say I have To satisfy a Two prong Test To show prosecutorial misconduct. I believe I have, this is a case of Identity where no one came into the Trial and said "That's The guy." So minus the "enter and remains" element of the crime, the state Tried To bolster their case with 404(b) evidence that was irrelevant To the Trial. Violating the courts ruling shows the prosecutors conduct was improper. I believe I have done that.

Second, the defendant must show that the

conduct had a prejudicial effect. Conduct has a prejudicial effect where there is a substantial likelihood the conduct affected the verdict.

The introduction of evidence the state claimed were burglary tools and go bags or ready bags, that the detective claimed were consistant with burglary was prejudial. An attempt to show identity through Modus Operandi, violating the courts pretrial ruling against 404(b) evidence.

This court should find that I have satisfied the two prong test. And reverse and remand back to the trial court with instruction to dismiss with prejudice.

ISSUE THREE

In violation of the 5th, 6th and 14th Amendments of the United States Constitution as well as the Washington State Constitution Art. I Sec. 22.

The defendant, Mr Densmore, did not have the effective assistance of counsel prior to, at the time of and subsequent to trial.

In this case the attorney, Ms. Rivas, did no pretrial investigation to make a defense for the

accused in This case. Fact which were not developed but reflected show The attorney did not prepare. In Kimmelman v. Morrison, 477 U.S. 365 (1986) The court counsel's failure To seek supression of evidence recovered during an illegal search and seizure was deficient performance and where counsel failed To conduct any meaningful preTrial discovery and there existed no strategic reason, other than incompetency, the case required remand for a hearing to determine prejudice.

In The WashingTon CourTs Case Summary Sub#62, dated 05/26/2011, Order Setting Omnibus Hearing for 05/27/2011. In the Trial scheduling hearing Judge Kessler asks if everyone is ready To proceed To omnibus at 8:30 am the next day. Everyone said "yes." Then the next morning my presence is waived, the omnibus is waived all this is done without my consent. If a waiver was going To be done, then when the Judge asks if everyone is ready To proceed To omnibus, then The waiver should have

been asked for on 05/26/2011. This shows that counsel was ineffective. There is no reason to wait until my absence to waive my presence other ineffective counsel or incompetence. There is no sound stategic reasoning other than to avoid my objecting to the waiver.

In V.R.P. vol IV page 615 Line 5 The new attorney Ms Lowry says to the court; "And of course, something was changed up, and he didn't have notice of it. Um, and that maybe is ineffective assistance of counsel on Ms Rivas's part."

One of the biggest issues of inffectiveness is Ms Rivas's refusal to report juror misconduct at the end of the trial. The jury is being led into the courtroom and a juror is putting away what looked like a power cord to a laptop computor. I lean over and write on my note tablet that Ms. Rivas provides for me, I write "The juror in the blue shirt was wrapping up an electrical cord of some sort," Ms Rivas writes under my note, "He is allowed to have a laptop to do

work during breaks." She refused To object or even address the issue with The court. I am including a copy of the original note for this court To see.

When an attorney fails To object To juror misconduct they are ineffect.

Under Washington law, a defendant must satisfy a Two-prong Test in order To demonstrate an ineffective assistant of counsel claim. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). First, a defendant must show That defense counsel's representation was deficient, as defined as "falling below an objective standard of reasonableness." State v. McFarland, 127 Wn. 2d 322, 335-36, 899 P.2d 1251 (1995). Second, a defendant must show that he or she was prejudiced by the deficient representation. Id. Prejudice exist if:

... There is a reasonable probability that, except for counsel's unprofessional errors, the result of The proceeding would have been different. Id. However, The defendant does not need To go as far as To show That counsel's unprofessional

errors "more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068.

Under the second prong of the Strickland test, a defendant must show that the deficient representation prejudiced his or her right to a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In a case where the evidence against the defendant is not overwhelming and there is a reasonable probability that the outcome of the trial would have been different but for the deficient representation, the remedy is reversal, if not dismissal, of the conviction. State v. Saunders, 91 Wn.App. 575, 580-81, 958 P.2d 364 (1998); State v. Klinger, 96 Wn. App. 619, 980 P.2d 282 (1999); In Re Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997).

I am asking this court reverse and remand with instructions to dismiss with prejudice.

ISSUE FOUR

I was denied my constitutional rights according to the 5th, 6th and 14th Amendments of the United States Constitution and the Washington

State Constitution Art. I sec. 22.

I was deprived of an omnibus hearing. I have the right to be present at all stages of the Trial process and no one has the right to waive my presence but me. Nor did I give permission to my attorney to waive my presence. As a result I was denied a very important part of the Trial process. I was denied my right to challenge evidence through 3.6 suppression hearing.

V.R.P. vol IV Page 615, The prosecutor claims that my presence was never waived.

Line 22 reads; Attorney Love: Mr. Densmore's presence was never waived. Uh, the parties agreed that we didn't need a Trial continuous, we would go right to Trial, we filled out the Omnibus paperwork and submitted it. This statement infers that the state knew of the 3.6 issues I had.

There is a part of CrR 4.5 (d) which reads "--- of which the party concerned has knowledge may constitute waiver of such error or issue." If I wasn't present at an omnibus

hearing then the state can't very well ascert the claim that I had knowledge that they were going to introduce any evidence at trial. In re Garrett, No 37293-9-I (Wash. App. Div I 04/28/1997), Slip Opinion at 14, n8.

IT is fundamental that a criminal defendant has a federal constitutional right to be present at every critical stage of the proceedings. A defendants right to be present during his trial is protected by the confrontation clause of the sixth amendment. Illinios v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The right is also protected by the Due Process Clause, which safeguards the public's interest in a fair and orderly judicial system. Bustamante v. Eyman, 456 F.2d 269, 274-75 (9th Cir. 1972), on appeal after remand sub nom. Bustamante v. Cardwell, 497 F.2d 556, (9th Cir 1974). See also United States v. Gagnon, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); State v. Thompson, 123 Wash. 2d 877, 880, 872 P.2d 1097 (1994).

the core of the constitutional right to be

present is the right to be present when evidence is being presented. Beyond that, the defendant has a right to be present at a proceeding when ever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge[.]

The state knew what they were doing when they waived the omnibus hearing. The state knew what evidence they presented to the jury in the first trial, which resulted in a hung jury. In order to go forward with a second trial the state knew they would have to present something different to a jury in the hope of not having the same result as the first trial. I have read some where that the State bears the burden of proving that a violation of the defendants right to be present was harmless beyond a reasonable doubt.

V.R.P. vol. IV page 615 Line 25 Ms. Love says; "So it was nothing that needed to go on the record, or it was nothing that secretly went on the record without, uh, Mr Densmore being there." The

state introduced evidence that was not in the first trial, the state didn't tell the defendant that they were planning to bring in the evidence and the state made sure the defendant wasn't present for an omnibus hearing. So that defeats the whole "Harmless beyond a reasonable doubt.

This court should reverse and remand for a new trial or with instruction for dismissal with prejudice.

ISSUE FIVE

In violation of the 5th, 6th, and 14th Amendments of the United States Constitution and the Washington State Constitution Art. I Sec 22. The court errored when it denied the motion for a new trial due to Juror Misconduct.

So here is how this issue is layed out in the record. V.R.P. vol. II page 382 Line 12, Attorney Rivas, I'm gonna ask the court, um, which I'm sure you would do anyway, but on the record, to give the admonition at every break not to do any research or other, um, seeking of outside information

about the case or any of the participants.
Line 22 The Court: Yeah, I was thinking I would also tell folks not to use any social media,
Then in V.R.P. vol. III page 592 Line 15
Attorney Rivas -- and I can state for the record -- I did see and it turned out to be the foreperson come in with a power cord that appeared to be a laptop in a bag.
Then in V.R.P. vol IV Page 619 Line 18
The Court: I also don't think that the, um juror misconduct is a basis for a new trial. I don't think its misconduct. the, the jurors are allowed to use their, um, computers during the time they're not actually in trial or deliberating. Um, obviously they're not allowed to look any thing up or anything, but we don't have any indication that that's what was going on. All we know was that, that there was a juror with a power cord, um, which indicates that he probably trying to -- using his, his, uh, laptop at the -- during recesses or something like that. But I don't have any

indication that there was anything improper the juror was doing. So, I'll deny the new Trial on that basis as well.

The Trial court should have conducted a postrial hearing To ask The juror what was he doing. Without speaking To The actual juror how can the judge say what the juror was or was not doing with the laptop. This is abuse of discretion on The part of the court.

We grant a new Trial only where juror misconduct has prejudiced the defendants. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740 review denied, 145 P.3d 1214 (2006); State v. Briggs, 55 Wn. App 44, 55, 776 P.2d 1347 (1989).

State v. Johnson 155 P.3d 183, 137 Wash. App. 862 Wash. App. Div 2 (04/10/2007) Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant To a new Trial if there are reasonable grounds To believe a defendant has been prejudiced, Briggs, 55 Wn. App. at 55 (citing

State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)). Any doubt that the misconduct affected the verdict must be resolved against the verdict. Briggs, 55 Wn.App. at 55 (citing Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)).

A new trial must be granted unless "it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. Briggs 55 Wn.App. at 56 (quoting United States v. Bagley 641 F.2d 1235 (9th Cir. 1981).

In the Defense Motion for a New Trial for Juror Misconduct During Deliberations, Attorney Rivas list three reasons. Reason no. Three reads as follows: On the day the verdict was rendered, when the jury entered the courtroom to give the verdict, the foreperson of the jury was observed by the defendant and counsel to have in his hand a power cord like that used for a laptop, and a briefcase.

I am including a copy of the motion that Ms. Rivas gave me in the courtroom. If you

in the bottom lefthand corner of the motion, she has, Defendants Motion To Deny Joinder of Offenses. Which show Ms. Rivas wasn't Taking it very seriously. This also helps to show that she was ineffective.

I believe the state cannot conclude beyond a reasonable doubt that the jurors use of the laptop was harmless because they didn't ask the juror what he was using it for and why he was using it. He may have erased any wrongdoing from the laptop or it may be corrupted due to a virus. So for this court to ask for an evidentary hearing to investigate this issue may just be a waste of time.

I am asking this court to reverse and remand with instructions to dismiss.

ISSUE SIX

In violation of the Due Process Clause of the 5th and 14th Amendments of the United States Constitution and the Washington State Constitution Art. I Sec. 22

The state delayed filing the charges for over one year while they waited for the outcome of a trial in Snohomish County. The King County incedent happened first and should have been tried first.

The prosecutor asked for a consecutive sentence, but had they of filed charges on the day of arrest which was 4/19/2009 then it would have been up to Snohomish County to decide on a concurrent or consecutive sentence.

In issue no. two the prosecutor leads the court to believe that the items obtained in the search warrant was enough to make an arrest on 4/19/2002. So the only reason for a delay in the filing of charges is to gain a tactical advantage.

In a Washington Supreme Court case; State v. Stien, 144 Wash.2d 236, 27 P.3d 184 (Wash 07/12/2001) Sanders J. dissenting

Article I, section 10, of the Washington State Constitution mandates Justice in all

cases shall be administered openly, and without unnecessary delay.

The plain language of the section thus reveals the commitment of the framers to decide cases in a manner that is both just and swift. Accordingly, unnecessary delay in and of itself is an error of constitutional magnitude.

Our constitution simply mandates justice be administered 'without unnecessary delay.' Unless this clause is mere surplusage we are not at liberty to ignore it. To the contrary, it is written in the imperative. When delay is unnecessary it violates the constitution.

The constitution is mandatory, not discretionary: 'The provisions of this constitution are mandatory, unless express words they are declared to be otherwise.' Const. Art. I, sec. 29.

The due process clause requires dismissal only when the delay caused substantial prejudice to defendant's rights to a fair trial and ... was intentional device to gain tactical advantage over the accused. United States v. Marion,

404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed 468 (1971); United States v. Nixon 634 F.2d 306, 310 (5th Cir 1981); United States v. Ramos 586 F.2d 1078, 1079 (5th Cir 1978).

The consecutive sentence show prejudice. I am asking this Court To Reverse and Remand with instruction for dismissal with prejudice.

ISSUE SEVEN

The conviction of Burglary, Second Degree, requires reversal because there is no evidence To support the conviction and an essential element of the crime in violation of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

In This case The state charged me, Mr Densmore, with Second Degree Burglary in violation of RCW 9A.52.030.

Jury instruction no. 6; A person commits The crime of burglary in The second degree when he or she enters or remains unlawfully in a building with The intent To commit a

crime against a person or property there in.

At no place does any Testimony place me, Mr Densmore, in The building.

V.R.P. vol. III page 498 The prosecutor asks Bryce Bentler who was The bartender.

Q: Now, Mr. Bentler, do you recognize anyone in The courtroom Today from the one of the people that you served back in Febuary of 2009?

A: No.

Then on page 503 Defense attorney, Ms Rivas, asks Mr. Bentler.

Q: And that statement, "If it was any of these guys," that implies that it might not have been any of these guys?

A: Absolutely

Ms. Rivas goes To cross-examination of Mr. Wahbi V. R. P. vol. III page 425

Attorney Rivas: Good morning.

A: Good Morning.

Q: Lets just get right To it. You said That you know This gentleman here, correct?

A: Yes, ma'am.

Q: And Thats from The previous Trial on This case, correct?

A: No -- yes, well I saw him last Time out of here.

Q: Right, and in That Trial you weren't able To identify anyone in the courtroom isn't That right?

A: I, I never been asked That question.

Q: Ooh, oh, you were asked, You were asked, "Do you recognize anyone in the courtroom?", just like Ms. Love asked you and your answer was "No", correct?

A: I don't recall That question.

V.R.P. vol. III page 569 line 9.... So as promised, let's circle back now To The main issue in this case, which is identity. Demonstrating that The defendant was one of The Three individuals who broke inTo The Celtic Bayou. So I'd like To review, uh, some of the Testimony with you.

The prosecutor Then goes on To just reiterate The Testimony of the witness's. Yet none of the witness's Testified That I was The one who committed the crime. Or That I was seen on The video

Without evidence to support the "entered or remained unlawfully in a building" portion of the element of Second Degree Burglary has not been proven.

In this case I was not a party to the crime of second degree burglary as alleged. The burden falls on the state to prove the elements of the offense committed. Here, the evidence is not lacking it is simply not present. The State, upon whom the burden is cast, must prove guilt of each element of the offense beyond a reasonable doubt. Sandstrom vs. Montana, 422 U.S. 510, 520 (1979); In Re: Winship, 397 U.S. 358

In Winship, the court held for the first time that the Due Process Clause of the 14th Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt" of every fact necessary to constitute the crime with which he is charged. The constitutional standard recognized in the Winship case was expressly phrased as one that protects an accused against a conviction except on "proof beyond

a reasonable doubt.". In subsequent cases discussing the reasonable doubt standard, we have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves.

In a case with similar facts to the present case, State v. Heller, No 36802-1-II (Wash. App. Div II 02/24/2009). The court held that an accused charged with the conviction of second degree burglary was entitle to a reversal and new trial. In Heller there was no evidence and testimony placing Heller in the place burglarized. Heller was charged with breaking in to a laundry room. No evidence placed him in the laundry room. He was seen in the Hallway and fled through a window, but he was not placed in (entering or remaining unlawfully in) the building. Based on the evidence the Court of Appeals for the Second Division Reversed and Remanded the case for a New Trial. A similar result should follow in this case.

In this case, at most and giving the state the benefit of all presumptions, the evidence shows that I (Mr Densmore) may or may not

have been a customer during regular business hours. And yet no one testified to being 100% positive.

In Kelly v. Roberts, 998 F.2d 802 at 809 (10th cir 1993). The court granted an unconditional writ of habeas corpus releasing the prisoner because the evidence at trial was insufficient under Jackson v. Virginia, 443 U.S. 307 (1979), and the petitioner had been in custody ten years for a crime the state had failed to prove. Cf., Singer v. Court of Common Pleas, 879 F.2d 1203 (3rd Cir 1989).

Because of the State v. Heller case herein, the arguments and authorities cited, this case requires Reversal since the elements of RCW 9A.52.030 have not been proven beyond a reasonable doubt.

CONCLUSION

Because of the State v. Heller case herein, the arguments and authorities cited, this case requires Reversal since the elements of RCW 9A.52.030 have not been proven

beyond a reasonable doubt.

A new trial may be required for a sum of errors, even when the errors individually would not be sufficient for reversal. State v. Marks 71 Wash.2d 295, 427 P. 2d 1008 (1967); State v. Vadda, 63 Wash.2d 176, 385 P.2d 859 (1963).

In this case each of the errors highlighted above individually denied me (Mr. Densmore) a fair trial; collectively the errors definitely require the need for a new trial

If there are additional grounds, a brief summary is attached to this statement.

DATED this 10th day of April, 2012.

James Densmore
(Appellant Signature)

James Densmore
(Appellant's Printed Name)

Stafford Creek Correction Center
191 Constantine Way, Unit# H6A93
Aberdeen, Washington 98520

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* vs. JAMES MICHAEL DENSMORE, *Defendant.*	No10-C-04053-2 SEA Defense Motion for a New Trial for Juror Misconduct During Deliberations

MOTION

COMES NOW the Defendant, James Michael Densmore, by and through his attorney, Ruth L. Rivas, and moves the court for an order granting a motion for a new trial based upon juror misconduct.

The Defendant, James Densmore, believes he should be granted a new trial for the following reasons:

1. Prior to being empaneled, the jurors were cautioned not to do any outside research on the case and not to seek out information about the case or the parties outside of what was provided to them in court.
2. The jurors were cautioned again after being sworn in accordance with the WPIC.

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3. On the day the verdict was rendered, when the jury entered the courtroom to give the verdict, the foreperson of the jury was observed by the defendant and counsel to have in his hand a powercord like that used for a laptop, and a briefcase.

Criminal Rule 7.5 clearly states that the court may grant a motion for a new trial under a number of instances when it affirmatively appears that a substantial right of the Defendant was materially affected. Subsection (2) cites misconduct by the prosecutor or a juror. In this case, Mr. Densmore believes that his right to a fair trial was materially affected by the apparent use of the laptop by the presiding juror. It is clear that the juror was using the laptop. Mr. Densmore contends that if the juror used the laptop at all, his right to a fair trial was impacted because either the juror was researching as prohibited, or not able to pay attention due to the need to check on pressing work matters. The appearance is enough, to Mr. Densmore, to warrant a new trial.

Therefore, the Defendant asks the court to grant a new trial.

RESPECTFULLY submitted this 5th day of July, 2011.

NORTHWEST DEFENDERS ASSOCIATION

Ruth Llewellyn Rivas
WSBA No. #38465
Attorney for Defendant

NORTHWEST DEFENDERS ASSOCIATION
1111 - Third Avenue, Suite 200
Seattle, Washington 98101

The juror in The blue shirt was wrapping up an electrical cord of some sort

He is allowed to have a laptop to do work during breaks.

Under the penalty of purjury I declare under The laws of the State of Washington that The foregoing is True and correct.

This is The question I asked my Attorney, Ruth Rivas and her response:

James Densmore
James Densmore

		JDG0018	Judge Susan Craighead, Dept 18	
-	05-09-2011	AUDIO LOG	Audio Log	
-	05-09-2011	JURY FEE ASSESSED	Jury Fee Assessed /12	250.00
49	05-10-2011	ORDER TO COMPEL PRODUCTION	Order To Compel Production	
50	05-10-2011	ATTACHMENT	Attach/summary Of Pretrial Rulings	
51	05-10-2011	ASSIGNED TO	Assigned To Jdg Craighead	
52	05-10-2011	RESPONSE	Response To Mtn For A Hearing	
53	05-12-2011	DEFENDANT'S PROPOSED INSTRUCTIONS	Defendant's Proposed Instructions (with Citations)	
54	05-12-2011	PLAINTIFF'S PROPOSED INSTRUCTIONS	Plaintiff's Proposed Instructions (with Citations)	
54A	05-12-2011	COURT'S INSTRUCTIONS TO JURY	Court's Instructions To Jury	
-	05-13-2011	MISTRIAL	Mistrial	
55	05-13-2011	JURY NOTE	Jury Note	
56	05-13-2011	VERDICT	Verdict Form A /not Used	
57	05-13-2011	VERDICT	Verdict Form B /not Used	
58	05-13-2011	VERDICT	Verdict Form C /not Used	
58A	05-13-2011	ORDER FOR PAYMENT WITNESS EXPENSES	Order For Payment Witness Expenses	
-	05-13-2011	WITNESS FEES ASSESSED	Witness Fees Assessed	30.00
59	05-16-2011	EXHIBIT LIST	Exhibit List	
60	05-16-2011	STIP&OR RET EXHBTS UNOPNED DEPOSTNS	Stip&or Ret Exhbts Unopned Depostns	
61	05-23-2011	NOTICE OF SCHEDULING	Notice Of Scheduling	05-26-2011
62	05-26-2011	ORDER SETTING TRIAL DATE	Order Setting Trial Date	06-01-2011
-	05-26-2011	WAIVER OF SPEEDY TRIAL	Waiver Of Speedy Trial 06-12-11	
-	05-26-2011	ORDER SETTING OMNIBUS HEARING	Order Setting Omnibus Hearing	05-27-2011
-	05-26-2011	SET CASE SCHEDULE	Set Case Schedule	06-01-2011ST
62A	05-26-2011	STATUS CONFERENCE / HEARING JDG0044	Status Conference / Hearing Judge Ronald Kessler, Dept 44	05-27-2011
-	05-26-2011	AUDIO LOG	Audio Log Dr E1201	

63	05-27-2011	OMNIBUS ORDER	Omnibus Order	
64	05-27-2011	OMNIBUS HEARING JDG0044	Omnibus Hearing Judge Ronald Kessler, Dept 44	
64A	06-01-2011	HOLD TRIAL UNTIL: JDG0044	Hold Trial Until: Judge Ronald Kessler, Dept 44	06-02-2011
65	06-02-2011	NOT OF APPEAR AND REQ FOR DISCOVERY	Not Of Appear And Req For Discovery	
66	06-02-2011	NOTICE OF WITHDRAWAL OF ATTORNEY	Notice Of Withdrawal Of Attorney	
66A	06-02-2011	HOLD TRIAL UNTIL: JDG0044	Hold Trial Until: Judge Ronald Kessler, Dept 44	06-06-2011
66B	06-02-2011	HOLD TRIAL UNTIL: JDG0044	Hold Trial Until: Judge Ronald Kessler, Dept 44	06-06-2011
66C	06-02-2011	MOTION HEARING JDG0044	Motion Hearing Judge Ronald Kessler, Dept 44	
-	06-02-2011	AUDIO LOG	Audio Log Dr E1201	
66D	06-02-2011	JURY TRIAL JDG0030	Jury Trial Judge Douglass A. North, Dept 30	
-	06-02-2011	AUDIO LOG	Audio Log Dr W764	
-	06-02-2011	JURY FEE ASSESSED	Jury Fee Assessed - 12	250.00
67	06-03-2011	ORD FOR CONTINUANCE OF TRIAL DATE	Ord For Continuance Of Trial Date	06-02-2011
68	06-06-2011	HOLD TRIAL UNTIL: JDG0044	Hold Trial Until: Judge Ronald Kessler, Dept 44	06-07-2011
69	06-06-2011	HOLD TRIAL UNTIL: JDG0044	Hold Trial Until: Judge Ronald Kessler, Dept 44	06-07-2011
70	06-07-2011	ASSIGNED TO JDG0044	Assigned To Jdg North Judge Ronald Kessler, Dept 44	
71	06-07-2011	ASSIGNED TO JDG0044	Assigned To Jdg North Judge Ronald Kessler, Dept 44	
72	06-08-2011	PLAINTIFF'S PROPOSED INSTRUCTIONS	Plaintiff's Proposed Instructions	
73	06-09-2011	VERDICT	Verdict Form A /guilty	
74	06-09-2011	VERDICT	Verdict Form B/ Guilty	
75	06-09-2011	VERDICT	Verdict Form C/ Guilty	
76	06-09-2011	COURT'S INSTRUCTIONS TO JURY	Court's Instructions To Jury	
76A	06-09-2011	ORDER FOR PAYMENT WITNESS EXPENSES	Order For Payment Witness Expenses	