

FILED
COURT OF APPEALS
DIVISION II

06 JUN 24 PM 12:59

STA. CLERK, COURT OF APPEALS, DIVISION II

BY Km
Clerk

No. 33160-8-II

**IN THE COURT OF APPEALS
DIVISION II**

STATE OF WASHINGTON

vs.

CODY E. SPRINGER

**APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
SUPERIOR COURT NO. 04-1-01262-5**

BRIEF OF APPELLANT

ROGER A. HUNKO
Attorney for Appellant
The Law Office of Wecker Hunko
569 Division Street, Suite E
Port Orchard WA 98366
(360) 876-1001

pm 1-23-06

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR... 1

C. STATEMENT OF THE CASE..... 2

 I. Factual Background..... 2

 II. Procedural Background..... 5

D. ARGUMENT..... 6

 1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE MR. CODY SPRINGER COMMITTED BURGLARY IN THE SECOND DEGREE, AS CHARGED IN COUNT I.

 2. APPELLANT’S CONDUCT FALLS SHORT OF THE REQUIREMENTS OF RCW 9A.08.020.

 3. THE STATE COMMITTED PREJUDICIAL PROSECUTORIAL ERROR BY SUGGESTING THAT THE DEFENSE HAD ANY BURDEN TO PRODUCE EVIDENCE AND MISSTATING LAW.

F. CONCLUSION..... 19

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Blakely v. Washington, 542 U.S. 296, 124 S. Ct 2531, 2536-37, 159 L.Ed.2d 403 (2004).....6

State v. Green, 94 Wn. 2d 216, 220-21, 616 P.2d 628 (1980).....6

In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....6

State v. Chapin, 118 Wn.2d 681, 692, 826 P.2d 194 (1992).....7

In Re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).....9

State v. Aiken, 72 Wn.2d 306, 349, 434 P.2d 10 (1967).....9

In re Personal Restraint Petition of Pirtle, 136 Wn. 2d 467, 481, 965 P.2d 593 (1998).....15

State v. Rooth, 121 P.3d 755 (2005) citing, State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).....17

Washington Court of Appeals Decisions

State v. LaRue, 74 Wn. App. 757, 762, 875 P.2d 701 (1994).....8

State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990).....8

State v. Jennings, 35 Wn. App. 216, 220, 666 P.2d 381, 100 Wn.2d 1024 (1983).....10

State v. Alford, 25 Wn. App. 661, 663, 611 P.2d 1268 (1980).....10

<u>State v. Trout</u> , 125 Wn. App. 403 (2005).....	11
<u>State v. Gallagher</u> , 112 Wn. App. 601, 608, 51 P.3d 100 (2002).....	13
<u>State v. Vaillancourt</u> , 122 N.H. 1153, 453 A.2d 1327 (1982).....	13
<u>State v. Fleming</u> , 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).....	15
<u>State v. French</u> , 101 Wn. App. 380, 382-83, 4 P.3d 857 (2000).....	15

U.S. Court of Appeals Decisions

<u>United States v. Davis</u> , 154 F.3d 772, 784, (8th Cir. 1998).....	18
---	----

Statutes

RCW 9A.52.030.....	1
RCW 9A.52.030(1).....	5
RCW 9A.08.020(2)(c)	5
RCW 9A.76.170.....	5
RCW 9A.08.020.....	8

A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering judgment and sentence where the evidence was insufficient to support the appellant's conviction.
2. The trial court erred when it denied the defense motion to dismiss the accomplice liability against Mr. Springer. The evidence was insufficient to demonstrate accomplice liability.
3. The trial court erred when it gave the jury Instruction 10, Accomplice Liability, which was unsupported by the evidence.
4. The trial court erred when it denied defense's motion to grant a mistrial based on prosecution's insinuation that the defendant has a burden to produce a witness at trial.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was the evidence insufficient to support a conviction for Burglary in the Second Degree?
2. Is mere presence at the scene of an alleged burglary, even if coupled with a trespass into a building, sufficient evidence to establish a violation of RCW 9A.52.030 as an accomplice?

3. Was Springer denied a fair trial where the prosecutor improperly shifted the burden of proof to Springer by asking during cross-examination where a potential witness is today, thus suggesting that Springer has a burden to produce a witness at trial and where the prosecutor made a misstatement of law during closing arguments?

C. STATEMENT OF THE CASE

I. Factual Background

Mr. Cody Springer is a twenty-year old man who has lived his whole life in Port Orchard. 02/14/2005 VRP 130-31.¹ On the evening of August 11, 2004, at about 8:30 or 9:00 he went over to a friend's house. 02/14/2005 VRP 131. Mr. Springer was with a friend named Joe Baza and the friend's house they visited belonged to Dustin Hunt. 02/14/2005 VRP 131. After about a half an hour at the home of Dustin Hunt, Dustin left to go to Silverdale, leaving Springer and Baza behind at the home waiting for him to return. 02/14/2005 VRP 132. The home of Dustin Hunt has no landline in it. 02/14/2005 VRP 132-33. After waiting between three and half or four hours for Dustin Hunt to return home, Springer wanted to call his girlfriend for a ride home, however they were in a dilemma because they didn't have a phone. 02/14/2005 VRP 133.

¹ The volumes of transcripts shall be referenced herein by date followed by page number: e.g., 02/14/2005 VRP 130.

The two of them came up with the idea that they could go use the phone down at an acquaintance's home. 02/14/2005 VRP 134-35. Springer and Danny were acquaintances of many years and Springer thought that Danny and Baza were friends, but wasn't sure. 02/14/2005 VRP 134-35. In fact, Springer had often used a trail going by this house when he was in school and remembers the home having dogs, and even got bit by one dog. 02/14/2005 VRP 136. Mr. Jay Townsend testified that his son's name is Daniel Townsend, and Daniel had recently lived in a cabana with a sliding door. 02/14/2005 VRP 72, 74, 76. Throughout the trial, this separate little structure, on the property of Mr. Townsend is referred to as both a "pool house" and a "cabana" interchangeably. E.g., 02/14/2005 VRP 60, 74, 79, etc ...

Not knowing if Danny was home or not, Springer and Baza walked down to the pool house, and found the screen door open, and Springer stepped two feet inside, and Baza handed him a cordless phone. 02/14/2005 VRP 136-37. Springer spent about three to five minutes on the phone with his girlfriend, while smoking a cigarette. 02/14/2005 VRP 137. While he talked on the phone, he continued to smoke his cigarette, and stood right outside next to the screen door. 02/14/2005 VRP 138. Tara Brown, the girl friend of Springer, testified that she received a phone call from Springer that evening and spoke on the phone with him for about

five minutes. 02/14/2005 VRP 115. Brown indicated that a topic of conversation that night was transportation issues, and that after the call she left to go pick him up. 02/14/2005 VRP 116.

As Springer talked on the phone, he heard Baza yell out "Danny" a couple of times, as if he was looking for him or trying to wake him up. 02/14/2005 VRP 139. Springer saw Baza switch on a bedroom light. 02/14/2005 VRP 139. When finished talking on the phone, he sat the phone down on a stand next to the screen door and said to Baza, "Okay, well, Tara is on her way. Are you ready to go?"

At this point, Springer started walking away, and thought Baza was getting ready to walk out the front door and walk with him. 02/14/2005 VRP 140. Springer wasn't paying attention and thought that Baza might be following a couple of feet behind him. 02/14/2005 VRP 141.

Mr. Townsend awoke to the sounds of his dog barking. 02/14/2005 VRP 77. He looked through the window of his daughter's room and saw two shadow figures and thought that he saw one shadow figure just inside the cabana, and another figure about ten feet inside it. 02/14/2005 VRP 78-79. As to the figure that he thought was just inside the cabana, he couldn't be sure if that figure was at the door or inside. 02/14/2005 VRP 79, 97-98. He couldn't really tell if one of the figures was carrying something or not. 02/14/2005 VRP 80. Eventually, he

tripped over a television set, outside near the fire-pit on his property. 02/14/2005 VRP 90, 92. The remote control to this television has been missing since the night of the incident. 02/14/2005 VRP 103.

Springer and Baza were taken into custody after being located a short distance away from the pool house in some brush. 02/14/2005 VRP 66-68.

II. Procedural Background

The State charged Springer by first amended information with one count of burglary in the second degree, with the mode of commission being accomplice liability and with a count of bail jumping, contrary to RCW 9A.52.030(1), 9A.08.020(2)(c) and 9A.76.170. Springer proceeded to trial.

At the close of the State's case, the defense moved to dismiss the accomplice liability. 02/14/2005 VRP 106. The trial court denied this motion. 02/14/2005 VRP 111. In the same vein, defense argued that there was insufficient evidence to present to the jury WPIC instruction 10.51, accomplice liability. 02/15/2005 VRP 201. The court denied this motion. 02/15/2005 VRP 203.

At the close of the defense case, Springer requested a mistrial on the grounds that the State had improperly shifted the burden of proof by suggesting that Baza was available to testify at the trial, and suggesting

that Springer should have gotten Baza to testify. 02/14/2005 VRP 169. The State conceded this was a constitutional violation. 02/14/2005 VRP 169. The trial court denied this motion. 02/14/2005 VRP 177. Lastly, Springer argues that there was insufficient evidence to convict him of the burglary in the second degree.

At the conclusion of the jury trial, Springer was found guilty on all counts.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE MR. CODY SPRINGER COMMITTED BURGLARY IN THE SECOND DEGREE, AS CHARGED IN COUNT I.

It is axiomatic that a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. U.S. Const. amend. 6,² U.S. Const. amend. 14,³ Wash. Const. 1 § 3,⁴ Blakely v. Washington, 542 U.S. 296, 124 S. Ct 2531, 2536-37, 159 L.Ed.2d 403 (2004); State v. Green, 94 Wn. 2d 216, 220-21, 616 P.2d 628 (1980). The prosecution must prove all elements of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed.

² The Sixth Amendment provides in relevant part, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . .”

³ The Fourteenth Amendment provides in relevant part, “[n]o state shall. . . deprive any person of life, liberty, or property, without due process of law. . . .”

⁴ Article 1, § 3 provides, “[n]o person shall be deprived of life, liberty, or property without due process of law.”

2d 368, 90 S. Ct. 1068 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing all evidence in a light most favorable to the state, could find that all elements of the crime were proven beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 692, 826 P.2d 194 (1992); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

To prove the offense of Burglary in the Second Degree as charged here, the state had to establish that Springer committed the following elements of the charged offense:

- (1) A person is guilty of burglary in the second degree, if with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

RCW 9A.52.030

Here there is insufficient evidence to suggest that a burglary occurred. Admittedly, the facts at trial strongly suggest that Baza and Springer trespassed into the cabana located on Townsend's property. However, the only indication of an intent to commit a crime against a person or property therein appears to be from the testimony of Townsend stating that it looked like somebody was carrying something. 02/14/2005 VRP 80. At some point a television is located next to the fire pit on the

property. 02/14/2005 VRP 92. At no point, was either figure seen in possession of this television set.

To be guilty of burglary, a person must “enter” a dwelling with an intent to commit a crime against a person or property therein. Here there is no indication that the two individuals entered the property with any intent other than to use the phone. When discussing the possibility that the defendant’s unscrewed a cable from a television set, the prosecuting attorney described it as a “nice crime of opportunity.” 02/15/2005 VRP 219. At best, this is what the evidence demonstrates, “a nice crime of opportunity” and not a planned burglary.

Because the evidence is insufficient, reversal of the conviction and dismissal of the charge is required. State v. LaRue, 74 Wn. App. 757, 762, 875 P.2d 701 (1994); State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990).

2. APPELLANT’S CONDUCT FALLS SHORT OF THE REQUIREMENTS OF RCW 9A.08.020.

RCW 9A.08.020, Washington’s accomplice liability statute, provides in relevant part:

(2) A person is legally accountable for the conduct of another person when:

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of a crime he

(i) solicits, commands, requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it. . . .

Washington case law has consistently supported the axiom that mere physical presence, even if coupled with assent, is insufficient to support a conviction for aiding and abetting. In Re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

To support conviction of a defendant as an accomplice, there must be evidence that he was "ready to assist" or intended to encourage the conduct of his coparticipant; mere presence at the scene of the crime is insufficient. In Re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979), quoting from State v. Aiken, 72 Wn.2d 306, 349, 434 P.2d 10 (1967). An accomplice must be associated "with the venture and participate in it as something he wishes to bring about and by his action make it succeed."

State v. Jennings, 35 Wn. App. 216, 220, 666 P.2d 381, review denied, 100 Wn.2d 1024 (1983).

Assuming there was a burglary, clearly, there is no evidence that Springer had prior knowledge that the friend he was associating with on the night incident was going to commit a burglary. The level of proof present in the instant case is far less than that found in other cases involving accomplice liability.

In State v. Alford, 25 Wn. App. 661, 663, 611 P.2d 1268 (1980), Alford was convicted of first-degree assault, second-degree burglary, and first-degree theft. In that case, Alford, a co-defendant named Claborn, and a third person, purchased two guns together. Id. Later that evening, they broke into a tool shop, with Claborn armed with one of the two guns, and Alford carrying a crowbar. Id. They loaded up their truck with tools and equipment from the tool shop and drove away. Id. A police officer noticed non-functioning taillights on the truck, and followed it. Id. Claborn drove evasively and Alford began firing at the officer with one of the two guns purchased earlier in the day. Id.

On appeal, Claborn argued insufficient evidence that he was liable for the first-degree assault on a theory of accomplice liability. Id. at 666. He argued that he merely drove the truck and there was no evidence that he encouraged or aided Alford. Id. The court of appeals disagreed with

Claborn, and found substantial evidence that the jury could use to infer accomplice liability. Id. Claborn's evasive driving, and the fact that Alford used one of the guns purchased together was found to be substantial evidence of accomplice liability. In Springer's case, the evidence is far weaker than what was present in Claborn's case. Springer made no overt acts to facilitate anything Baza did in the pool house.

Another case discussing the sufficiency of evidence for accomplice liability is State v. Trout, 125 Wn. App. 403 (2005). In that case Jason Fox broke into the Nicholas Bunn's car and stole several items. Id. at 407. Later, Nicholas and others gathered at Adam Trout's apartment and there was a heated discussion about the theft. Id. Nicholas called Jason, and Jason challenged him to come take certain property out of his car. Id. A group of five men left Adam Trout's apartment and went to the apartment where Jason lived. Id. The group of five men included Adam, Nicholas, and three others, with Nicholas carrying a bat, and the two other men carrying a knife, and a gun. Id.

When they arrived at Jason's apartment, Jason was not there, however three other individuals were there: Jennifer, Trina and Jeremy. Id. Jennifer heard a knock at the door, and opened it a crack, and then saw five men, one with a gun, one with a bat, and one with a knife. Id. She attempted to close the door but the group of five men forced their way in

and shouted “where’s Jason?” Id. at 407-08. What followed was a robbery of the three individuals in the apartment, and assaults on all three individuals. Id. at 408. Trina’s testimony at trial was that Trout just stood there as they were all being assaulted. Id. at 411. Also he was at the doorway and not inside during the robbery and assault. Id. at 410.

On appeal, Trout argued that he did not solicit command, encourage, or request another to commit the crimes charged, nor did he agree to aid. Id. at 408-09. Relying on the evidence that the plan to go to Jason’s apartment was hatched while at Adam’s apartment, and that he drove off with the group armed with weapons, and participated in barging into the apartment, the court of appeals found ample evidence to support the finding of accomplice liability. Id. at 410-11, 413.

Again, it is helpful to distinguish this case from the instant case. In Springer’s case, there is no evidence to suggest that facilitated the burglary. He and Baza did not go to the cabana armed with weapons, as was found in the Trout case. In the Trout case, the five men all barged into the apartment together, at least minimally suggesting that they were working in concert. Here, the actions of Baza and Springer are wholly independent of each other – Springer talks on the phone for five minutes or so, and Baza is apparently wandering through the pool house.

The dissenting opinion in Trout found insufficient evidence to demonstrate accomplice liability for the crimes charged. Id. at 421. The dissent found that while Trout had the knowledge of an initial plan to recover property from Jason, there was no evidence that he knew any of his actions would promote the actual crimes charged – that is the assaults on the three individuals in the home and the robbery of those three victims. Id. at 423-24.

Although this is the dissenting opinion from Trout, the analysis is illustrative for the case involving Springer. Springer and Baza clearly came up with a plan to enter a property to gain access to a phone despite a lack of permission to do so. 02/14/2005 VRP 134-35. All of the evidence suggests that this was the plan to use a phone. Springer did in fact use the telephone in the cabana to call his girlfriend Tara Brown. 02/14/2005 VRP 115. Accomplice liability requires proof that the person charged knew he was aiding in the commission of the charged crime, not merely that defendant knew he was aiding in planning, or committing some crime. State v. Gallagher, 112 Wn. App. 601, 608, 51 P.3d 100 (2002).

Although certainly not controlling authority, a helpful case is State v. Vaillancourt, 122 N.H. 1153, 453 A.2d 1327 (1982). This case involved an attempted burglary. Id. Two men rang the doorbell to a home, and stood conversing and waiting for about ten minutes. A

neighbor watched this and saw them walk around to the side of the home, where one of the men allegedly attempted to break into a basement window. Id. The defendant allegedly stood by and watched his companion, and talked to him intermittently while the companion tried to pry open the window. The neighbor called the police. Id.

The Vaillancourt court found the defendant's conduct consistent with previous rulings of "mere presence" and held that accompaniment and observation are not sufficient acts to constitute "aid" for the relevant state accomplice liability statute.

In the instant case, some overt evidence that Springer was there to assist or ready to aid in a crime is missing from the trial. The evidence, at best, demonstrates "mere presence" at the scene of some alleged attempted burglary. There was insufficient evidence to support the finding of guilt based on a mode of commission as accomplice liability, and the trial court erred in giving the accomplice liability jury instruction to the jury.

Because the evidence is insufficient, reversal of conviction and dismissal of the charge is required. State v. LaRue, 74 Wn. App. 757, 762, 875 P.2d 701 (1994); State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990).

3. THE STATE COMMITTED PREJUDICIAL PROSECUTORIAL ERROR BY SUGGESTING THAT THE DEFENSE

HAD ANY BURDEN TO PRODUCE EVIDENCE AND MISSTATING
LAW.

To prevail on a claim of prosecutorial misconduct, Springer has the burden of showing both improper conduct and its prejudicial effect. In re Personal Restraint Petition of Pirtle, 136 Wn. 2d 467, 481, 965 P.2d 593 (1998). 'A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt.' State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). A prosecutor commits misconduct if he attempts to shift the burden of proof, which in a criminal case rests on the State, rather than the defendant. State v. French, 101 Wn. App. 380, 382-83, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996).

The first instance of misconduct in this case occurred during the prosecutor's cross-examination of Springer. The prosecuting attorney asked Mr. Springer the following line of questioning:

Q: well, let me ask you then, today, where is Joe Baza today?

A: I think he was just here.

Q: All right. Is he here because he's got his own case coming up; is that right?

02/14/2005 VRP 164

The defense counsel objected to this line of questioning. The court sustained the objection. 02/14/2005 VRP 164. Further questioning continued:

Q: But he's not here today --
A. No.

The defense counsel continued to object to this questioning, and asked the court to strike the whole line of questioning. 02/14/2005 VRP 164. The court overruled this. 02/14/2005 VRP 164. Shortly after this, the defense moved for a mistrial based on the State's questioning and reference to a witness not being present, and argued that it placed a burden on Springer to produce a witness. 02/14/2005 VRP 169. The state conceded that there had been a constitutional violation. 02/14/2005 VRP 169. The court deemed a mistrial as unnecessary, and instead indicated that the jury will be told that they are not to consider Mr. Baza's presence or absence in any way as they examine Springer's guilt or innocence. 02/14/2005 VRP 177.

In the instant case, the court erred in denying the motion for a mistrial. Mr. Baza's presence at trial certainly would have been enlightening since he was present during the entire alleged criminal incident. Following this line of questioning, the jury is left wondering why they never heard from Baza during the trial. Furthermore, as argued by defense counsel, a curative instruction to the jury merely exaggerates and points out the burden shift to the jury. 02/14/2005 VRP 172.

In this case, the prosecutor tried to shift the burden of proof by implying that Springer had a responsibility to produce a witness at trial who would have essential information about the events leading to the criminal allegations. By implying in more than one question to Springer that Springer was unable to produce a witness for trial, the prosecutor likely left the false impression in the minds of the jurors that Springer had some responsibility to prove his innocence and that his failure to do so proved his guilt.

The second instance of misconduct occurred during the closing argument by the State and was not objected to by the defense. Where a defendant fails to object to an improper remark, he waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill-intentioned that is caused enduring and resulting prejudice that a curative instruction could not have remedied. State v. Rooth, 121 P.3d 755 (2005) citing, State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

The prosecuting attorney's closing remarks, in relevant portion, stated the following:

Now, here we go back to what Cody Springer know and when did he know it. Was he entering in that building intentional to commit a crime? Well, that's the question of the day. . . .

Even if they are going to use the phone, you could probably argue among yourselves that itself could constitute a crime, and that's even a long list of their local calls are part of a package plan, it may not add anything. Or how about turning on the light using electricity? Could that be? It could be as simple as that. And I'm not suggesting you find that. But it doesn't have to be a specific crime. It just has to be a crime.

02/15/2005 VRP 231.

As previously indicated in this brief, accomplice liability requires proof that the person charged knew he was aiding in the commission of the charged crime, not merely that defendant knew he was aiding in planning, or committing some crime. Gallagher, 112 Wn. App. at 608, 51 P.3d 100 (2002). The prejudicial effect of the misconduct is determined through review of the cumulative effect of the misconduct, the strength of the untainted evidence of guilt, and the curative actions taken by the court. Russell, 125 Wn.2d 24 at 85-86. United States v. Davis, 154 F.3d 772, 784, (8th Cir. 1998).

Here, the prosecutor's remarks that "it doesn't have to be a specific crime" and that "it just has to be a crime" are in direct contradiction to the state of the law in Washington State. Springer had to have had knowledge of the specific crime planned by the principal, and not just any crime. The effect of the error is great because it one of the primary issues to be

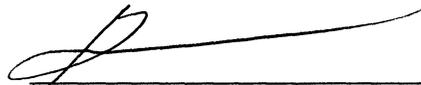
determined by the jury at trial. It's effect could only have been to confuse or mislead the jury with respect to the current state of Washington law. No curative actions were taken by the court because these remarks by the prosecutor were never objected to by defense counsel.

The prosecutor's misstatement of the law can be characterized as highly prejudicial to the defendant in this instance. This misstatement of law combined with the prosecutor's improper questioning concerning Baza's presence, likely left the jury with the mistaken impression that Springer could have done more to exonerate himself, and would have if he were indeed innocent. The extent of the misconduct is prejudicial and likely affected the outcome of the trial.

F. CONCLUSION

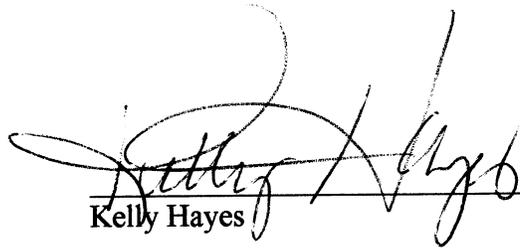
Based on the foregoing arguments, Cody Springer respectfully requests this Court reverse and dismiss his convictions.

Respectfully submitted this 23 day of January, 2006.



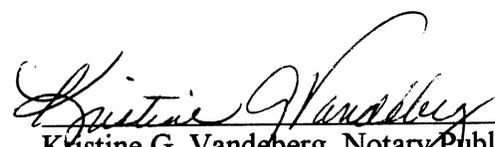
Roger A. Hunko, WSBA #: 8285
Attorney for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



Kelly Hayes

SUBSCRIBED AND SWORN to before me this 23rd day of January, 2006.



Kristine G. Vandenberg, Notary Public in
and for The State of Washington.
My Commission Expires: 7/28/09.