

No. 35933-2-II
COURT OF APPEALS, DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent

vs.

JONATHAN J. JENSEN,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Chris Wickham, Judge
Cause No. 02-1-00447-8

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Jensen's motion for a new trial based on jury misconduct where extrinsic evidence was introduced by Juror 6—an experiment she conducted in her home.
2. The trial court erred in entering Findings Of Fact, Conclusions Of Law, And Order Denying Motion For A New Trial Based Upon Juror Misconduct Conclusions of Law Nos. 1 and 2; and the Order denying Jensen's motion for a new trial based on jury misconduct.
3. The trial court erred in denying Jensen's motion for a new trial based on his trial attorney's undisclosed conflict of interest that adversely affected his performance at Jensen's trial.
4. The trial court erred in entering Findings Of Fact And Conclusions Of Law Re: Hearing On Remand From The Court Of Appeals Findings of Fact Nos. 1-8 and Conclusion No. 3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Jensen's motion for a new trial based on jury misconduct where extrinsic evidence was introduced by Juror 6—an experiment she conducted in her home? [Assignments of Error Nos. 1 and 2].
2. Whether the trial court erred in denying Jensen's motion for a new trial based on his trial attorney's undisclosed conflict of interest that adversely affected his performance at Jensen's trial? [Assignments of Error Nos. 3 and 4].

C. STATEMENT OF THE CASE

Jonathan J. Jensen (Jensen) was charged by second amended information filed in Thurston County Superior Court with four counts of

child molestation in the first degree (Counts I-IV), and with two counts of gross misdemeanor indecent exposure (Counts V-VI). [CP 9-10].

Jensen was tried by a jury the Honorable Daniel J. Berschauer presiding. [9-16-02 RP 4-33; 9-17/18-02 RP 4-207]. The jury found Jensen guilty of child molestation in the first degree on Count I, guilty of child molestation on the first degree in Count II, guilty of child molestation on the first degree in Count III, not guilty of child molestation in the first degree on Count IV, guilty of indecent exposure on Count V, and not guilty of indecent exposure on Count VI. [CP 33, 34, 35, 36, 37, 38]. Prior to sentencing, Jensen filed a motion for a new trial alleging jury misconduct in that a juror had introduced extrinsic evidence into deliberations after conducting an experiment at home, requesting an evidentiary hearing regarding the same, and requesting a stay of sentencing. [CP 39-42, 43-44, 50-54].

On October 24, 2002, the court ordered an evidentiary hearing regarding Jensen's motion for a new trial based on jury misconduct. [10-24-02-RP 3-11]. The court then proceeded with sentencing. The court sentenced Jensen to concurrent standard range sentences of 120-months on Count I, 120-months on Count II, 120-months on Count III based on an offender score of 6 on each of these counts, and 365-days on Count V for a total sentence of 120-months. [CP 56-66; 10-24-02 RP 11-20].

On December 13, 2002, after Jensen filed a notice of appeal, the matter came before the court for an evidentiary hearing regarding Jensen's motion for a new trial based on jury misconduct. [12-13-02 RP 3-88]. The court heard testimony from 8 of the 12 jurors, which testimony indicated that 6 of the jurors admitted to hearing a non-testifying juror state that she had conducted an experiment at home with a mirror based on the testimony during the trial. [12-13-02 RP 12-48]. After hearing the testimony and argument from counsel, the court clarified certain points in anticipation of entering written findings and conclusions and reserved final ruling on the matter. [12-13-02 RP 49-88]. On December 20, 2002, the court denied Jensen's motion for a new trial based on jury misconduct, but did not reduce this ruling to written findings of fact and conclusions of law. [12-20-02 RP 2-7].

Thereafter, Jensen moved for recusal of the trial court and filed a supplemental motion for a new trial based on his attorney's conflict of interest in that his attorney was facing charges similar to Jensen's while he was representing Jensen and failed to disclose the same. [CP 61-71, 77-78, 83-86; 3-14-03 RP 3-13]. The court agreed to recuse itself from hearing Jensen's motion for a new trial based on his attorney's undisclosed conflict of interest. [3-14-03 RP 12-13].

Before this motion for a new trial was heard, this court filed its opinion on Jensen's appeal/PRP. [CP 87-102]. This court reversed one of Jensen's child molestation in the first degree convictions for insufficient evidence and remanded the matter back to the trial court for a hearing on whether Jensen's attorney's pending charges created a conflict of interest that affected counsel's ability to represent Jensen. [CP 87-102].

On June 28-30, 2006, the matter came before the Honorable Chris Wickham for hearing on Jensen's motion for a new trial based on his attorney's conflict of interest. [6-28/30-06 RP 5-216]. After hearing testimony from Jensen, his wife, a friend of the Jensens', Jensen's trial attorney, and Jensen's trial investigator as well as argument from both Jensen and the State, the court denied Jensen's motion for a new trial based on his attorney's conflict of interest. [6-28/30-06 RP 5-261].

The court entered the following written Findings Of Fact And Conclusions Of Law Re: Hearing On Remand From The Court Of Appeals:

A. FINDINGS OF FACT

1. The primary arguments asserted by the defendant in this hearing were (a) that the defendant had difficulty communicating with defense counsel during the time leading up to trial; (b) that defense counsel did not interview a minor named David as a potential defense witness; and (c) that defense counsel failed to call certain witnesses to testify at trial.

2. While the defendant may have had some difficulty contacting defense counsel during the period of time leading up to the trial of this Cause, resulting in the defendant having feelings of anxiety and frustration, there has been no showing that this difficulty in communication had a prejudicial impact on defense counsel's performance.
3. Defendant's trial counsel relied significantly upon investigator Susan Watts for the defense investigation in preparation for trial, including contact with potential witnesses. On September 10, 2002, Watts became aware for the first time that the State would not divulge the whereabouts of a minor named David, whom Watts was seeking to interview as a possible defense witness.
4. Watts apparently had no difficulty communicating with defense counsel about this problem with contacting David, since a motion to continue the trial because of this problem was filed by defense counsel three days later.
5. The defense motion to continue the trial was denied. Thereafter, neither Watts nor defense counsel was able to contact David prior to the trial of this cause, not did David testify at the trial. However, nothing in the record shows that David would have had important evidence to present to the jury.
6. Defendant's counsel did prepare for trial, did discuss with the defendant a defense to present at trial, did put together that defense, and did have appropriate defense witnesses available at the trial to testify.
7. During the presentation of the defense case at trial, defendant's counsel became convinced that the jury was prepared to find in favor of the defendant, and therefore made the tactical decision not to call a number of potential defense witnesses to testify. While this decision may have been a mistake, no evidence has been shown indicating that this decision was the result of the charges pending against

defense counsel. Rather, the decision was based on defense counsel's sense of the jury.

8. To the extent that there were deficiencies in defense counsel's representation of the defendant, there has been no showing that any such deficiency was caused by the existence of charges pending against defense counsel.

Based on the above Findings of Fact, and the applicable legal principles, the Court makes the following:

II. CONCLUSIONS OF LAW

1. As the Court of Appeals has previously found, defendant's trial counsel violated the Rules of Professional Conduct by failing to disclose to the defendant that there were charges pending against defense counsel during counsel's representation of the defendant.
2. Defendant has the additional burden of showing that defense counsel's pending charges constituted an actual conflict of interest that adversely affected counsel's representation of the defendant. To satisfy this burden, the defendant must show that defense counsel's pending charges had some prejudicial impact on counsel's performance.
3. The defendant has failed to meet his burden of showing an adverse impact on defense counsel's performance resulting from the charges pending against defense counsel.

The defendant was charged with four counts of first-degree child molestation and one count of indecent exposure. At trial, he was convicted of three counts of first degree child molestation and the one count of indecent exposure. On appeal, the Court of Appeals ruled that one of the convictions for first-degree child molestation must be vacated and dismissed with prejudice due to insufficient evidence. Upon remand from the Court of Appeals, based upon the above Findings of Fact and Conclusions of Law, this Court hereby affirms the defendant's remaining two convictions for first-

degree child molestation, as well as the conviction for indecent exposure.

[CP 109-112].

The court also entered the following written Findings Of Fact, Conclusions Of Law, And Order Denying Motion For A New Trial Based Upon Juror Misconduct:

I. FINDINGS OF FACT

1. This court has jurisdiction over the parties and the subject matter of this motion.
2. There was evidence presented at trial indicating that the victim had observed certain conduct in a mirror; such conduct alleged to be the basis of one of the charges. Juror number 6, at home, set up a mirror in her hallway in an attempt to duplicate some of the evidence from trial to see if someone could, in fact, see what was claimed to have been seen in a mirror at a distance of about 30 to 31 feet. There is no evidence that this juror tried to duplicate the evidence more precisely than, perhaps, to utilize the same size mirror.
3. On the second day of jury deliberations, Juror 6 commented that she had set up the mirror in her hallway and opined that she thought she could see a reflection. One juror believed Juror 6 said that she could not see images in the mirror.
4. Juror 6's comment was heard by some but not all of the other jurors. Juror 6 did not expand upon her opinion and none of the other jurors asked any questions of Juror 6 as to what she did or what she saw. Additionally, Juror 6's opinion was not discussed among the other jurors.

Having so found, the Court enters the following:

II. CONCLUSIONS OF LAW

1. Juror 6 did not commit misconduct. What Juror 6 did in her home was a reenactment of the evidence produced at trial. It was not novel or extrinsic evidence because it involved testimony and exhibits admitted and discussed at trial. This was not information that was “outside all the evidence.” This reenactment done by Juror 6 in her home was nothing more than an application of everyday perceptions and common sense to the issues presented at trial.
2. Even if Juror 6’s actions were misconduct, it was harmless beyond a reasonable doubt. The reenactment did not involve any sophisticated equipment, it did not raise any novel theories, it involved only what could be seen in a mirror, which are common sense everyday perceptions, and it was not discussed by the other jurors.

Therefore, the Court enters the following:

III. ORDER

1. Defendant’s Motion for a new trial based upon juror misconduct is DENIED.

[CP 107-108].

Timely notices of appeal regarding the denial of both motions for a new trial were filed on January 30, 2007, and February 12, 2007. [CP 113-116, 117-122]. This appeal follows.

D. ARGUMENT

- (1) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY JENSEN'S MOTION FOR A NEW TRIAL BASED ON JURY MISCONDUCT WHERE JUROR 6 IMPROPERLY INJECTED EXTRINSIC EVIDENCE, AN EXPERIMENT SHE CONDUCTED AT HOME, INTO THE DELIBERATIONS.

The United States and Washington Constitutions entitle a criminal defendant the right to a trial by an impartial jury. U.S. Const. Amend. 6; Art. 1, sec. 22 (amend. 10); *See Duncan v. Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). One guarantee of impartiality is that the jury is constrained to determine factual issues only on the basis of evidence produced in open court. *Bayamoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986); *See Turner v. Louisiana*, 379 U.S. 466, 13 L. Ed. 2d 424, 85 S. Ct. 546, 549-550 (1965); WPIC 1.01A.¹

The interjection of extrinsic evidence into the jury's deliberations violates this principle as well as a defendant's right to due process of law. U.S. Cons. Amend. 5; Art. 1, sec. 3. "Novel or extrinsic evidence is

¹ WPIC 1.01A admonishes juries in the following manner:

The only evidence you are to consider consists of testimony of witnesses and exhibits admitted into evidence....

It is important to the concept of a fair trial that all matters having to do with this case come to you only in court. It is also important that you keep your mind free of outside influences....

Do not seek out evidence on your own....

This concept is reflected in Court's Instructions to the Jury No. 1 which states:

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence....

[CP 13].

defined as information that is outside all the evidence admitted at trial.”
Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Consideration by the jury of such evidence is improper because it will not have been subject to objection, cross-examination, explanation, or rebuttal by either party. Id at 270; *see also* State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 301 (1994). Our State Supreme Court has long described the distinction between impermissible extrinsic evidence and acceptable testing of admitted evidence during jury deliberations as follows:

[I]f the experiment, or what the jury has done, has the effect of putting them in possession of material facts which should have been supported by evidence upon the trial, but which was not offered, this generally constitutes such misconduct as will vitiate the verdict. But if the experiment merely involves a more critical examination of an exhibit than had been made of it in court, there is no ground of objection.

State v. Everson, 166 Wash. 534, 536-37, 7 P.2d 603 (1932).

Consideration by the jury of information that is outside the evidence admitted at trial necessitates a new trial if there is a reasonable ground to believe that the defendant may have been prejudiced thereby. State v. Cummings, 31 Wn. App. 427, 642 P.2d 415 (1982); State v. Barnes, 85 Wn. App. 638, 669, 932 P.2de 669 (1997); State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992); *see* CrR 7.6(a)(1), (2), (5), and (8).

As stated in 150 A.L.R. 958, p. 960, it is generally held that where a test, demonstration, or experiment is conducted during an authorized view, which concerns matters forming a material part of a civil action or criminal prosecution, upon which evidence has been submitted by both parties to the proceedings and which test, demonstration, or experiment in a sense amounts to the reception of evidence independently acquired out of court, tending to influence the verdict, where there is no question of waiver on the part of the complaining party, relief should be granted to the losing party in the form of a new trial or reversal of the judgment. [Citations omitted].

Steadman v. Shackelton, 52 Wn.2d 22, 28, 322 P.2d 833 (1958).

Here, Jensen was charged with 4 counts of child molestation in the first degree and 2 counts of indecent exposure. [CP 9-10]. The critical evidence presented at trial was the testimony of the victim, A.S., accusing Jensen of these acts and Jensen's testimony denying the same. Thus, the case turned on credibility—that of A.S., and that of Jensen. The State did not offer or admit any exhibits. The only exhibits admitted at trial, which were admitted by Jensen, were a diagram and photos of Jensen's home where the crimes allegedly took place including photos of a mirror in which A.S. claimed she saw Jensen committing the crime(s). [9-17/18-02 RP 86-94]. The mirror itself was never admitted into evidence.

After the case was submitted to the jury, Juror 6 took it upon herself to go home, find a mirror, and recreate A.S.'s testimony by attempting to see an image in the mirror from a distance similar to A.S.'s

testimony. [CP 43-44, 107-108] Juror 6 then returned to deliberations and stated to the other jurors what she had done. [CP 43-44, 107-108].

Jensen brought the matter to the attention of the trial court via a motion for a new trial based on jury misconduct. [CP 39-42; 43-44]. At a hearing regarding Jensen's motion for a new trial based on jury misconduct, 8 jurors were called to testify with 6 of these jurors recalling Juror 6's injecting extrinsic evidence into the deliberations with her statement regarding what she had done at home. [12-13-02 RP 3-88]. Juror 6 was not present as she was traveling on an extended vacation. [12-13-02 RP 10, 17].

It cannot be disputed that Juror 6's "experiment" constituted improper extrinsic evidence requiring a new trial. In cases involving "experiments" by the jury, the determining factors as to whether the "experiment" constituted improper extrinsic evidence and thus jury misconduct requiring a new trial are 1) whether the "experiment" involved a testing of evidence admitted at trial; and 2) whether the "experiment" occurred during jury deliberations in the presence of all the jurors. *See State v. Balisok*, 123 Wn.2d at 118 (during jury deliberations, the jury reenacted crime testing claim of self defense); and *State v. Brown*, 139 Wn.2d 20, 983 P.2d (1999) (during jury deliberations, the jury reenacted the crime using a coat admitted into evidence). Unlike *Balisok* and *Brown*,

the “experiment” in the instant case was not conducted during deliberations—it was done at Juror 6’s home outside the presence of the other jurors—and was not conducted with evidence admitted at trial (the actual mirror). What is particularly troubling about Juror 6’s conduct given that it occurred outside the deliberation process is that there is no way of knowing exactly what took place i.e., the size of mirror she used—was it identical to the mirror in question; did it have the same clarity as the mirror in question; was the distance she attempted to recreate in actual fact the same as purported in Jensen’s home; was the lighting the same; and were the conditions of her home the same as the Jensen home—any obstructions.

Contrary to the court’s Conclusion of Law No. 1 [CP 108], Juror 6’s actions were jury misconduct in that her “experiment” injected information outside that admitted into evidence and cannot be called a testing of the evidence during the deliberation process as she did it outside the presence of the other jurors. A new trial is warranted when a jury considers information other than the evidence admitted at trial. State v. Balisok, 123 Wn.2d at 118.

Moreover, there is every likelihood that Juror 6’s misconduct contributed to the verdict in that at least for Juror 6, if not the other jurors who acknowledge hearing about Juror 6’s “experiment,” she had questions

regarding the testimony. This case turned on the credibility of A.S. as compared to the credibility of Jensen. As noted by the trial court at the conclusion of the hearing on jury misconduct:

One thing is clear to me. That if I find misconduct and if I find it's prejudicial, it's impossible under the facts in this case to parse out counts....This is a case where the entire case would either rise or fall on every count based upon the testimony of the complaining witness. And if it is misconduct and if it is prejudicial, it goes to that person's credibility and the jurors' view of that.

[12-13-02 RP 71]. Any improper information injected into the deliberation process tending to influence the determination of credibility calls into doubt the verdicts found by the jury. Contrary to the court's Conclusion of Law No. 2 [CP 108], Juror 6's misconduct cannot be considered harmless beyond a reasonable doubt.

Any doubt that consideration of extrinsic evidence affected a verdict must be resolved against the verdict. Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962).²

² Washington courts have not hesitated to reverse a conviction when the jury considered matters outside the evidence. *See, e.g.,* State v. Rinke, 70 Wn.2d 854, 425 P.2d 658 (1967); State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) (unproven aliases on cover sheet to instructions submitted to the jury); State v. Boggs, 33 Wn.2d 21, 207 P.2d 743 (1949), *overruled on other grounds*, in State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980) (jury considered exhibits previously ruled inadmissible by the court); State v. McChesney, 114 Wash. 113, 194 Pac. 776 (1921) (juror's personal knowledge of cattle theft); State v. Parker, 25 Wash. 405, 65 Pac. 776 (1901) (juror's personal knowledge of defendant).

[A] new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict....

State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989) (*citing* United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir. 1980) (*quoting* Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir. 1980)).

Here, based on the fact that the jury reached its verdicts in a case turning on credibility after Juror 6 conducted an “experiment” at home thereby improperly injecting extrinsic evidence into the deliberations, it cannot be concluded beyond a reasonable doubt that this extrinsic evidence did not contribute to the verdict with the result that the jury’s verdicts of guilty cannot stand. The trial court erred in failing to grant Jensen’s motion for a new trial based on jury misconduct. This court should reverse Jensen’s convictions and remand for a new trial.

(2) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY JENSEN’S MOTION FOR A NEW TRIAL WHERE HIS TRIAL COUNSEL FAILED TO DISCLOSE A CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS REPRESENTAION OF JENSEN.

The Sixth Amendment to the United States Constitution affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995) *citing* Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L.

Ed. 2d 220 (1981). Reversal is required where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983); Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

An actual conflict occurs if, during the course of representation, the parties' interests diverge with respect to a material factual or legal issue or to a course of action. State v. Robinson, 79 Wn. App. 386, 394, 902 P.2d 652 (1995). To demonstrate that the lawyer's performance was "adversely affected" by the actual conflict, the defendant must show the conflict "hampered his defense." Id at 395. The conflict must cause some lapse in representation contrary to the defendant's interests, or have "likely" affected counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant. Id. The defendant must point to specific instances in the record suggesting that the attorney was caught in a "struggle to serve two masters." Id. A defendant is not required to demonstrate prejudice in the sense of showing that the conflict of interest affected the outcome of the trial. Cuyler v. Sullivan, 446 U. S. at 349-50; In re Richardson, 100 Wn.2d at 677.

In order to obtain a new trial, Jensen must establish 1) that his attorney had an actual conflict of interest; and 2) that his attorney's conflict of interest adversely affected his performance. With regard to the

first prong of this test, the trial court in Conclusion of Law No. 1 [CP 111], much as this court did in its opinion remanding the matter back to the trial court for a hearing [CP 95-102], determined that Jensen's counsel did in fact have an actual conflict of interest when he failed to disclose to Jensen that counsel had charges similar to Jensen's charges pending during his representation of Jensen in violation of RPC 1.7(b). Thus, it is only the second prong—whether counsel's performance was adversely affected by the conflict that is at issue.

On June 28-30, 2006, the trial court held a hearing regarding counsel's performance during Jensen's representation. The trial heard testimony from Jensen and his wife, who was subpoenaed to testify at trial but was not called by Jensen's counsel, both of whom expressed frustration at the inability to contact Jensen's counsel and the lack of trial preparation including failing to contact a potential witness, David, failing to obtain A.S.'s school records, and failing to view their home. [6-28/30-06 RP 36-48, 62-74]. This failure to properly investigate Jensen's case, demonstrates how his counsel's actual conflict adversely affected his performance in that credibility was the key issue at trial and the available information had it been properly investigated and produced at trial would have called into question A.S.'s credibility (others were present refuting her contention that the crimes occurred and the school records may have

demonstrated she was in fact in school when the crimes occurred). The Jensens' concerns regarding his counsel's representation were corroborated by Susan Watts, the investigator involved in Jensen's case, who testified to her own frustrations in contacting counsel and her deep concern that he "wasn't doing anything" particularly as he had not interviewed witnesses (requiring a eleventh hour request for a trial continuance that was denied [9-13-02 RP 14-19]) and had not even viewed the scene of the alleged crimes. [6-28/30-06 RP 132-143]. According to Jensen and his wife, his counsel was only interested in obtaining a SSOSA plea. [6-28/30-06 RP 36-48, 62-74]. Jensen's trial counsel also testified acknowledging his undisclosed conflict of interest, and while he couldn't recall all the specifics of the case, he did acknowledge that he did not call Jensen's wife or David to testify, did not obtain A.S.'s school records, and believed he had viewed the scene when according to all the other witnesses at the hearing he had not; he excused his inactions by explaining that he thought the jury was going to rule for Jensen. [6-28/30-06 RP 97-128].

Given these facts, it cannot be said that Jensen's attorney's performance was not adversely affected by his undisclosed conflict of interest. The trial court erred in finding to the contrary (Conclusion of

Law No. 3 and the paragraph following [CP 112]). The trial court should have granted Jensen's motion for a new trial.

E. CONCLUSION

Based on the above, Jensen respectfully requests this court to reverse his convictions and remand for a new trial.

DATED this 2nd day of October 2007.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 2nd day of October 2007, I delivered a true and correct copy of the brief of appellant to which this certificate is attached by United States Mail, to the following:

Jonathan J. Jensen
DOC# 846371
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

Signed at Tacoma, Washington this 2nd day of October 2007.

Patricia A. Pethick
Patricia A. Pethick

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