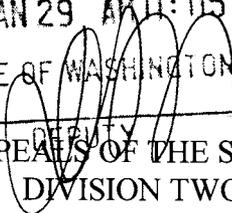


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COURT OF APPEALS
DIVISION II

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NO. 38092-7-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HOWARD SMITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan Serko, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the essential element of possession in the possession of stolen property charge.

2. The state failed to prove beyond a reasonable doubt the essential element of identity in the possession of stolen property charge.

3. The state failed to prove beyond a reasonable doubt the essential element of identity in the theft in the second degree charge.

4. The state failed to prove beyond a reasonable doubt the essential element of value in excess of \$250 in the theft in the second degree charge.

5. Counsel was ineffective for failing to move to suppress video and DVD evidence that was introduced without a proper foundation or chain of custody.

6. Juror misconduct denied appellant his right to a fair trial where a juror indicated that she felt pressured but was not permitted to explain the details to the court.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt the essential element of possession in the possession of stolen property charge?

2. Did the state fail to prove beyond a reasonable doubt the essential element of identity in the possession of stolen property charge?

3. Did the state fail to prove beyond a reasonable doubt the essential element of identity in the theft in the second degree charge?

4. Did the state fail to prove beyond a reasonable doubt the essential element of value in excess of \$250 in the theft in the second degree charge?

5. Was counsel was ineffective for failing to move to suppress video and DVD evidence that was introduced without a proper foundation or chain of custody?

6. Was appellant denied his right to a fair trial when the judge refused to dismiss a juror who indicated that she felt pressured but was not permitted to explain the details to the court?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Kevin Smith was charged by amended information with theft in the second degree in violation of RCW 9A.56.020(1)(b) and RCW 9A.56.030(1)(a)1 and possession of stolen property in the second degree in violation to RCW 9A.56.140(1) and 160(1)(c). CP 3-4. Following a jury

¹ The charging document listed the wrong section and should have listed RCW

trial, Mr. Smith was convicted as charged in the amended information. CP 36, -38. Kevin Smith This timely appeal follows. CP 56.

a. Lack of Foundation For Video/CD

During Agent Bjornstad's testimony, the state introduced 11 videos and DVD's of the transactions allegedly involved in this case. RP 42, 83, 93, 108, 110, 117, 114, 118, 171. The original visuals were analog video that were transferred to digital technology and later copied to DVD's. Id; 81-82. The transfer of technology involved converting and compressing the original video's and editing out portions that Agent Bjornstad did not believe were relevant. The compressing of the tapes made it impossible to determine the time frames involved in each transaction. RP 81-83, 85. Defense counsel did not require the state to lay a foundation for the video or DVD exhibits and did not object to the admission of the video and DVD exhibits. RP 42, 83, 93, 108, 110, 117, 114, 118, 171.

b. Juror Misconduct

After both parties finished closing argument juror #9 Martha Shefveld approached the court and informed the judge that her conscience was bothering her. RP 268. Ms. Shefveld told the court that she feared a hung jury and had a "dilemma". RP268, 270, 274. The judge did not allow Ms.

9A.56.040(1)(a).

Shefveld to speak freely, but asked if Ms. Shefveld could be fair and impartial to which she answered “yes”. RP 273. The Court sent Ms. Shefveld back to deliberate. RP 277. A short time later, presiding juror # 5 Orville Swift informed the court through the clerk that Ms. Shefveld was unwilling to deliberate further. The clerk asked Ms. Shefveld if she read instruction #1 to which she replied “yes”. Ms. Shefveld stated that she was being pressured and she was not in agreement with the rest of the jurors and asked to be replaced. RP 296.

The court denied defense motion for a mistrial for juror misconduct stating that “this is not an unusual situation”... “but I think this is a highly unusual situation.” The judge implied that she thought it was unusual for jurors to inform the court of pressure to change their position. RP 298.

2. SUBSTANTIVE FACTS

Officer Stanley Larive is a naval officer who works for the Navy as an assistant supply officer at Commander Group 9 in Bangor, WA. RP 146-47. Officer Larive explained that Commander 9 has a fleet of government cars for certain staff members. RP 148. Each car is assigned a specific Voyager gas credit card. RP 148. General fueling takes place on the Naval base where a credit card is not necessary, but off base, the Voyager card is used to purchase

gas. RP 148. The credit cards not assigned to the Admiral and Chief of Staff are kept in a file cabinet that is open during the day but locked at night. RP 149-50. Any Naval personnel with a building access code and special badge can access the room where the credit cards are filed. RP 154. Officer Larive did not realize that two of the Voyager cards were missing until an Inspector General informed him on June 26, 2006 after the dates involved in this case. Officer Larive believed that recently discharged officer Purdy who is similar in height and description to Mr. Smith may have taken the cards after being discharged for trouble. RP 157. No one investigated Mr. Purdy. RP 202.

Witness Dewayne Schroeder, owner of the Shell station at 8433 Hosmer saw a transaction on May 9, 2006 that he believed was improper. RP 39. He called the Voyager credit card company which provides credit cards for government fleet cars to report the use of the card for two gas fuel transactions separated by minutes for cars that did not appear to be government cars. RP 40, 42, 62. Mr. Schroeder viewed a young African American male use a credit card to pay for gas for 2 cars. RP 44. Mr. Schroeder reviewed his register receipt to learn that the credit card was a Voyager card. RP 39-40.

Mr. Schroeder was unable to positively identify Mr. Smith as the man

who used the Voyager credit card to pay for fuel at his gas station on May 9, 2006. RP 46, 47. A third car attempted to obtain gas with the credit card, but the transaction was refused. RP 39. Mr. Schroeder inaccurately wrote down the license plates of the three cars involved in the fuel transaction as well as their descriptions. RP 40, 188. Mr. Schroeder testified that the third car, a Chrysler with license plate # 598 KDY, was driven by an African American male. RP 51-52, 56. Mr. Schroeder later contradicted himself and stated that a female drove that car. RP 54. Mr. Smith owns a 1999 Buick sedan. RP 178. One of the cars Mr. Schroeder described belonged to a Caucasian lawyer uninvolved in the transaction. RP 55. Mr. Schroeder provided inaccurate information regarding the license plate numbers and car descriptions. RP 188. The two transactions at Mr. Schroeder's store involved a total of \$79.35. RP 57.

The video surveillance of the May 9, 2006 transaction was not clear enough to provide identification of any individual. RP 189. Special Agent Christopher Bjornstad from the Government Services Administration ("GSA") investigated this case. RP 75-76. Mr. Bjornstad obtained the Voyager Fleet credit card database to determine when the specific Voyager credit card used on May 9, 2006 was used again for the period through June

2006. RP 76-78. The data base was not offered or admitted into evidence.

Agent Bjornstad learned of other transactions involving the same Voyager credit card. One occurred at a different Shell store on May 16, 2006, but the information on the video did not provide any identification of Mr. Smith or his car. RP 176. A May 17, 2006 video from a Shell station at 1430 72nd street similarly did not provide any identifying information on Mr. Smith or his car. RP 177. A video surveillance of a Shell located at 5601 Orchard street taken on May 23, 2006 involved the Voyager card but the video did not depict Mr. Smith, only what appeared to be his car. RP 108. The video from a May 28, 2006 Shell surveillance video from the 5601 Orchard Street Shell similarly did not show Mr. Smith, only a car that looked like his car. RP 108-09. A video surveillance from May 30, 2006 for the 1401 South Sprague Shell similarly was insufficient to provide any identification of Mr. Smith. RP 89-91

On June 2, 2006 Agent Bjornstad set up a surveillance and followed the car owned by Mr. Smith. RP 111. The car was driven by a female. RP 112. The female parked the car near a residence and Mr. Smith emerged from a van, spoke with the woman and joined her as a passenger in traveling to a Shell station at 1410 South Sprague. RP 112. The video from that store and

Mr. Bjornstad's video did not identify Mr. Smith as using a Voyager card to access gas. RP 189-192. None of the surveillance videos involved in this case were sufficient to provide any identification of Mr. Smith. RP 189. Agent Bjornstad focused on Mr. Smith's car. RP 212 However the license plate identified as Mr. Smith's that was used to identify Mr. Smith's car was not the same in several videos. RP 213. Moreover, Mr. Smith's car was misdescribed as a Chrysler when in fact it was a Buick. Furthermore, no witness ever observed a man driving Mr. Smith's car. RP 54, 112, 178, 188.

Agent Bjornstad admitted that the video quality was poor but attempted to identify Mr. Smith's car by rear end damage. RP 166, 169-70. Mr. Bjornstad attempted to identify Mr. Smith's car by rear-end damage but admitted that even though he observed rear car damage in the videos he could not determine if the cars were in fact the same car. RP 172.

Officer Larive from Bangor Naval Base provided Agent Bjornstad with the names of three persons who had access to the Voyager card and the name of Officer Purdy who was discharged from the Navy for misconduct; a person Officer Larive believed could have been responsible for the theft of the Voyager credit card. RP 201, 207. Agent Bjornstad did not perform any follow up investigation of any of the persons identified by officer Larive. RP

202, 207. Additionally, the actual government vehicle assigned to the Voyager Card being misused was legitimately serviced on May 25, 2006 using the Voyager credit card number at issue in Mr. Smith's case. RP 209. Agent Bjornstad did not investigate the person who authorized the maintenance using the Voyager credit card. RP 210.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF POSSESSION OF STOLEN PROPERTY IN THE CRIME OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE

The state bears the burden of proving all elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970);). State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). The standard of review for determining the sufficiency of the evidence is "whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979); Green, 94 Wn.2d at 94.

One of the essential elements of every crime is the identity of the perpetrator. "It is axiomatic in criminal trials that the prosecution bears the

burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense.” State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974) (citing, 1 H. Underhill, Criminal Evidence § 125 (5th Ed. P. Herrico 1956, Supp. 1970); 1 Wharton’s Criminal Evidence § 16 (13th ed. C. Torica 1972)). “[T]he identity of a defendant and his presence at the scene of the crime must be proven beyond a reasonable doubt” and are never presumed. State v. Johnson, 19 Wn. App. 200, 204, 574 P.2d 741 (1978); see also State v. Rich, 63 Wn. App. 743, 748, 821 P.2d 1269 (1992).

In the instant case, to prove the crime of possession of stolen property in the second degree, the state was required to prove that Mr. Smith knowingly possessed the stolen Voyager credit card with a value more than \$250 and less than \$1500. RCW 9A.56.160; State v. Plank, 46 Wn. App. 728, 731 P.2d 1170 (1987). Mr. Smith challenges the possession element and the value element as there was insufficient evidence that Mr. Smith actually possessed or used the stolen credit card. Possession may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession occurs when the defendant has dominion and control over the item even though the person does not have actual possession. *Id.*

The courts examine the totality of the facts and circumstance to determine if there is sufficient evidence to support constructive possession. State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731, review denied, 127 Wn.2d 1026 (1995). In Plank, supra, the Court of Appeals reversed a conviction for possession of stolen property where the evidence established only that the defendant was a passenger in a stolen vehicle. Plank, 46 Wn. App. at 733.

In State v. Callahan, supra, drugs were found on a houseboat. The evidence demonstrated that the defendant was sitting at a desk with another individual and a cigar box filled with various drugs was on the floor between the two men. The defendant admitted that two books on drugs, two guns, and a set of broken scales found on the houseboat belonged to him. He also stated that, while he had been staying on the houseboat for the preceding 2 or 3 days, he was not in the status of a tenant, cotenant, or subtenant. Defendant admitted that he had handled the drugs earlier in the day. The Supreme Court held that this was not sufficient evidence to support a finding of dominion and control. Callahan, 77 Wn.2d at 29

In State v. McCaughey, 14 Wn. App. 326, 541 P.2d 998 (1975), the defendant and a companion slept several feet from a station wagon parked off

a side road and were detained because the plates on the vehicle belonged on another vehicle. After searching the station wagon, the police found stolen property. The Court held that the defendant did not have actual physical possession, nor constructive possession of the stolen property, because the only evidence presented was that the appellant had access to the property and was in close proximity. The Court held this was not sufficient in the face of the admission by the companion to ownership of the car. McCaughey, 14 Wn. App. at 329-330.

In State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975), a married couple were convicted for possession of marijuana. The police searched the car they occupied and found marijuana in the trunk. The court reversed the wife/passenger's conviction, stating at page 417:

The only evidence tending to prove dominion and control on her part is circumstantial and consists of the fact that she was a passenger in the automobile and the deputy's testimony that he obtained the keys to the trunk from "either Mr. or Mrs. Harris."

None of the evidence presented in Smith's case established proof beyond a reasonable doubt that Mr. Smith possessed the stolen Voyager credit card. The state's eyewitness Mr. Schroeder testified that he could not

positively identify Mr. Smith as the person who used the credit card to fuel two cars at his Shell station on May 9, 2006. RP44, 36, 47, 189. The Video evidence that was transferred to digital technology did not show an identifiable image of Mr. Smith and the time lines were inaccurate due to the to compression during the transfer of technology. RP51, 52, 56, The DVD evidence showed an African American not identified as Mr. Smith. RP 189. One video identified a vehicle owned by Mr. Smith but driven by a female. RP 54, 178. The Voyager credit card was not found.

The balance of the video evidence showed an African American male who could have been Mr. Smith and a car that might have been Mr. Smith's. RP 89-91, 108-09, 111, 172, 167-77, 189-92. None of the images in the multiple videos identified Mr. Smith as being in possession or using the Voyager credit card. RP 198. Moreover, the only person ever seen driving Mr. Smith's car was a female. RP 54, 112.

In Smith's case there was less evidence than in any of the preceding cases cited and no real evidence of proximity to the credit card other than Mr. Smith's presence at a gas station when the card was used. The state relied on Agent Bjornstad's mis-identification of Mr. Smith's car to identify Mr. Smith as the alleged perpetrator of the crimes charged. This evidence when viewed

in the light most favorable to the state is not proof beyond a reasonable doubt that Mr. Smith possessed the credit card for possession of stolen property. The conviction for possession of stolen property should be reversed.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF IDENTITY AND VALUE IN EXCESS OF \$250 IN THE SECOND DEGREE THEFT CHARGE.

As stated supra, in Argument #1, the state bears the burden of proving all elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. at 364. One of the elements of theft in the second degree is the identity of the person who committed the offense.” Hill, 83 Wn.2d at 560; Johnson, 19 Wn. App. at 204 ; RCW 9A.56.040.(1)

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value, other than a firearm as defined in *RCW 9.41.010* or a motor vehicle; or

Mr. Smith was not identified in any DVD or video using a Voyager credit card.

b. Value Did Not Exceed \$250

In connection with the introduction of documentary evidence, the

Court granted the defense motion to suppress any hearsay evidence with regards to the discrepancy between the video transaction time and the times listed on the receipts. RP 31-33. The state conceded that the Agent could not testify to the reasons for the time disparity. RP 33. By the same token, the agent could not testify as to the amount of the transactions without a receipt to verify those figures because the agent had no personal knowledge or non-hearsay verification of the amounts in question. Moreover, the agent was not the custodian of records for Voyager and simply would not be able to lay an adequate foundation had he attempted to introduce the database from Voyager. For this reason, the only way to establish the amount of the transactions in question was either through a receipt or through the store owner's actual and direct knowledge of the amounts from their viewing of a receipt.

Id. The state presented Exhibits for only five of the transactions: Ex 1 and 2 for \$44.99 and \$34.36 on May 9, 2006; Ex 8 and 9 for May 17, 2006 for \$38.48 and \$32.73; and Ex 21 for June 2, 2006 for \$40.10. The total for these transactions was \$190.66. RP 57, 89-92, 135. There was no other credible evidence presented to establish the amounts involved in the transactions.

The state chose to forgo attempting to obtain a conviction for theft in the first degree and decided not to arrange for a Navy Witness to travel to Seattle to testify regarding the Voyager invoices. RP 30-31. The state incorrectly believed it could independently establish theft in the second degree. However, the actual value of goods stolen that the state was able to prove amounted to \$190.66. RP 57, 89-92, 135. Theft in the second degree requires a minimum theft of \$250. RCW 9A.56.040(1).

If the state was able to prove that Mr. Smith took \$190.66 dollars worth of services without permission from the owner, the state would have proof of no more than theft in the third degree. RCW 9A.56.050.

(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed two hundred and fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

Id. The state did not present credible evidence of any theft in excess of \$190.66.

For this reason, the state merely established theft in the third degree.

However, even though the state established a theft in the amount of \$190.66 by someone, the state did not prove beyond a reasonable doubt that

Mr. Smith stole this amount. Rather, the state established that at times, Mr. Smith's car was present during a transaction at a gas station in which the Voyager credit card was used. No witness ever saw Mr. Smith driving his car or using a Voyager credit card. Rather the two witnesses who identified Mr. Smith's car on two occasions identified a female driver. RP 54, 112.

The state failed to prove beyond a reasonable doubt either theft in the second or third degree. The theft conviction must be reversed.

3. COUNSEL WAS INEFFECTIVE; HAD COUNSEL MOVED TO REQUIRE THE STATE TO LAY A PROPER FOUNDATION AND ESTABLISH A CHAIN OF CUSTODY FOR THE DVD AND VIDEO EVIDENCE, THE ADMISSION OF EVIDENCE WITHOUT A PROPER FOUNDATION OR CHAIN OF CUSTODY WOULD HAVE BEEN AN ABUSE OF DISCRETION.

A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 85 L.Ed.2d 526, 105 S.Ct. 2169 (1985). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008, 140 L.Ed.2d 323, 118 S.Ct. 1193 (1998).

During trial, Mr. Smith's attorney did not object to the admission of the DVD and Video evidence on any basis. A physical object connected with a crime may properly be admitted into evidence when properly identified and when shown to be in substantially the same condition as when the crime was committed. Campbell, 103 Wn.2d at 21.

While the evidence need not be identified with absolute certainty, nor must every possibility of alteration or substitution be eliminated, the item must be properly identified as the same item placed into custody. Campbell, 103 Wn.2d at 21, citing, Brown v. General Motors Corp., 67 Wn.2d 278, 285-86, 407 P.2d 461 (1965). (emphasis added). Factors to be considered "include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." Campbell, 103 Wn.2d at 21, quoting, United States v. Gallego, 276 F.2d 914, 917 (9th Cir. 1960).

Chain of custody may be established even without proof of an unbroken chain of custody . . . "A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the party." State v. Picard, 90 Wn. App. 890, 897,

954 P.2d 336, review denied, 136 Wn.2d 1021, 969 P.3d 1065 (1998) (citation omitted) quoting, State v. DeCuir, 19 Wn. App. 130, 135, 574 P.2d 397 (1978). "[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility." Campbell, 103 Wn.2d at 21 citing, 5 KARL TEGLAND, Washington Practice § 90, at 203 (2d ed. 1982).

In Smith's case there was no testimony that the Videos and DVD's were ever in a secure location. The only discussion of the Agent's access to the video was his bringing it to his "office of investigations". RP 81. Defense counsel asked the agent if he modified the tape from May 9, 2006 to which the agent responded "Not to my knowledge". RP 83. Agent Bjornstad could not or did not state that he had not altered the tapes and DVD's. Id. Defense counsel never asked any foundational questions regarding the 11 other pieces of video and DVD evidence.

There was simply no chain of custody testimony. Either the chain of custody must be iron-clad or the witness must be able to positively identify the item in question. Neither occurred in Mr. Smith's case. Moreover Special Agent Bjornstad indicated that the DVD's were altered. He stated that everything was compressed when he transferred the tapes from analog to

digital and that he only recorded self-selected portions of the videos he believed relevant. RP 83, 85. There was no attempt to reconcile the altered DVD's with the original videos and the jury never viewed the original Videos.

In State v. Neal, 144 Wn.2d 600, 607-08, 610-11, 30 P.3d 1255 (2001), the Court held that the trial court abused its discretion by admitting the flawed lab certification evidence without the proper foundation and chain of custody. The abuse of discretion was held to be reversible error. The court reasoned that CrR 6.13(b), an exception to the hearsay rule, only provided for the admission of lab certifications in lieu of live testimony when the rule was strictly complied with. The Supreme Court agreeing with the Court of Appeals affirmed that the lab report and certification have two functions, "furnishing prima facie evidence of both the test results and the chain of evidence custody to and from the testing expert." State v. Neal, 144 Wn.2d. at 607. (Citation omitted).

In Neal, the Deputy was able to testify that he was the person who handled the substance between the Tacoma crime lab and the Skamania evidence vault, but his testimony did not supply the information specifically required by the court rule: the name of the person from whom

the tester of the substance received the evidence. State v. Neal, 144 Wn.2d at 606.

In Neal, in the context of introducing hearsay, the Supreme Court recognized that failure to strictly comply with the rules would create an unintended "catch-all" that would create an unacceptably unpredictable application of the law.

Despite purported safeguards, there is a serious risk that trial judges would differ greatly in applying the elastic standard of equivalent trustworthiness. . . . There would be doubt whether an affirmance of an admission of evidence under the catchall provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial court had abused its discretion.

State v. Neal, 144 Wn.2d at 610-11.

The facts in the instant case are more egregious than those in Neal, supra because in Smith's case both the chain of custody and the foundation for identification were flawed. In Smith's case, the trial court allowed the state to avoid both the chain of custody requirement and the identification requirement. This eliminated the evidentiary safeguards designed to protect the accused's right to due process. State v. Neal, 144 Wn.2d at 607-08.

In the instant case both the identification of the videos and DVD's and the chain of custody were insufficient to establish the necessary foundation. No witness testified to the whereabouts of the videos and DVDs for their entire duration from creation to the date of trial. Without a foundation and a proper chain of custody, this evidence should not have been admitted. *Id.*

Defense counsel was ineffective for failing to move to require the state to lay a foundation and establish a chain of custody for the admission of the video and DVD evidence because the state would not have been able to comply with such a court order and the trial court would have granted the motion. Admission of the video and DVD evidence without a foundation and clear chain of custody amounted to the type of "catch-all" held **impermissible** in State v. Neal, *supra*.

When the trial court abuses its discretion, the reviewing court must determine whether the error was harmless or prejudicial. Reversal is required if the error results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Neal, 144 Wn.2d at 611, *quoting*, State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Improper admission of evidence

constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a whole. Thieu Lenh Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

Under this test, plaintiff's critical exhibits #3, 6, 7, 12, 13, 14, 15, 16, 17, 19, 23 should have been excluded because the State could did not prove that the DVD's viewed by the jury had not been tampered with and that they accurately portrayed the incidents in question. The state could not have proceeded in its prosecution of Mr. Smith without the videos and DVD's because without them it would have been patently obvious that there was insufficient evidence to find the elements needed to prove the crimes charged.²

1. Counsel Ineffective, No Chain of Custody or Foundation

Counsel was ineffective for failing to require the state to lay the necessary foundation and valid chain of custody and for failing to move to suppress the evidence when the state would have been unable to lay such a foundation or establish a sufficient chain of custody. A criminal defendant has the constitutional right to effective assistance of counsel. U.S. Const., amend 6; Wash. Const. art 1 sect. 22; Strickland v. Washington, 466 U.S. 668, 685, 104

² Mr. Smith maintains that even as presented the state failed to prove the necessary elements of the crimes charged.

S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

To obtain relief based on a claim of ineffective assistance of counsel, a criminal defendant must establish that: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his case. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The defendant bears the burden of showing there were no "legitimate strategic or tactical reasons" behind defense counsel's decision to fail to move to suppress evidence that would not have been admissible had such a motion been brought before the trial court. State v. Meckelson, 133 Wn. App. 431, 436135 P.3d 991 (2006); State v. McFarland, 127 Wn.2d at 336. While the invited error doctrine precludes review of error caused by the defendant,³ the same doctrine does not act as a bar to review of a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996), citing, State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).

In Smith's case, defense counsel inexcusably failed to move to require the state to establish the chain of custody for videos and DVD's or establish a foundation for these same items of evidence. This resulted in their improper admission into evidence without any objection from defense counsel. There

were no tactical reasons for the failure to require the proper foundations for admission of the state's critical pieces of evidence.

A number of Washington cases stand for the proposition that defense counsel is ineffective where counsel fails to move to suppress inadmissible evidence because there can be no tactical reason for such a failure to move to suppress. State v. Meckelson, 133 Wn. App. at 436 (counsel failed to argue stop pretextual); State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001) (failure to move to suppress stop as pretextual); State v. Klinger, 96 Wn. App. 619, 623, 980 P.2d 282 (1999) (defense counsel was deficient in not moving for suppression when there was "no reasonable basis or strategic reason" for failure to move for suppression).

Mr. Smith met the first Strickland prong, because there was no legitimate strategic or tactical reason for the failure to request the necessary foundation for the introduction of the video and DVD evidence. McFarland, 127 Wn.2d at 336; Rainey, 107 Wn. App. at 135-36. Mr. Smith also met the second prong of the Strickland test: prejudice, because the "[f]ailure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought." Meckelson, 133 Wn. App. at 426, citing, Rainey, 107 Wn. App. at 136. If brought, Mr. Smith

³ See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

would have prevailed on a motion to suppress because the state would not have been able to lay an adequate foundation for the altered DVD and video evidence.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to require the state to lay a foundation and establish a chain of custody for the video and DVD evidence when it was unlikely that the state's witness would be able to do so. This establishes prejudice under Strickland, 466 U.S. at 687 because without the video and DVD evidence the state could not have prevailed at trial.

5. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A MISTRIAL FOR JUROR UNFITNESS OR MISCONDUCT.

Juror # 9 had a problem with her conscience. She was not allowed to inform the court of her "dilemma". Juror # 5 pressured juror number 59. This amounted to juror unfitness for juror # 9 and juror misconduct for juror #5.

a. Juror Misconduct

The Court reviews a trial court's investigation into jury misconduct for abuse of discretion. State v. Elmore, 155 Wn.2d 758, 761, 123 P.3d 72 (2005); State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). The

party alleging juror misconduct has the burden to show that misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The Court shall grant a new trial where juror misconduct has prejudiced the defendant. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740, review denied, 145 P.3d 1214 (2006). A juror who is harassed and pressured cannot fairly consider the case during deliberations. This denies the accused his right to a fair trial. United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818, 98 S. Ct. 58, 54 L. Ed. 2d 74 (1977). Such a juror is also unfit to serve.

In reviewing alleged juror misconduct, courts should focus on whether the communications between the jurors constituted deliberations. United States v. Resko, 3 F.3d 684, 689-91 (3d Cir. 1993); Stockton v. Virginia, 852 F.2d 740, 747 (4th Cir. 1988).

When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct.

State v. Johnson, 137 Wn. App. 862, 869 155 P.3d 183 (2007). citing, State v. Briggs, 55 Wn. App. 44, 53, 776 P.2d 1347 (1989). Juror misconduct

involving the introduction of extraneous evidence during deliberations entitles a defendant to a new trial when there is a reasonable ground 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). The inquiry “is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence, and includes consideration of the purpose for which the extraneous evidence was interjected into deliberations.” Johnson, 137 Wn. App. at 869-70, citing Briggs, 55 Wn. App. at 55-56. A new trial must be granted unless "it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." Johnson, 137 Wn. App. at 870, citing Briggs, 55 Wn. App. at 56, quoting United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir. 1981).

In Johnson, the juror told the jury but not the court that she had a family member who was date raped. The Court held that this jurors “injection of nondisclosed information into deliberations illustrated that she could not

be objective about the case at hand--the precise danger that voir dire is designed to prevent.” Johnson, 137 Wn. App. at 869. the Court held that due to the juror’s statements, Johnson was denied her right to a fair trial because prejudice likely flowed from the juror’s informing the jury of these personal facts. Id.

In Tate v. Rommel, 3 Wn. App. 933, 478 P.2d 242 (1970) the Court concluded that a juror stating his opinion on the guilt or innocence of a defendant is not evidence of misconduct that is so prejudicial as to warrant the granting of a mistrial because the comment was made to a non juror. Id. at 937-38. The courts reasoning indicates that such a comment made to other jurors would have been prejudicial.

In Smith’s case, as in Johnson and unlike in Tate, juror # 5 informed the court that #9 would not deliberate and juror #9 stated that she had a “dilemma” and that her “conscience” was bothering her. While not allowed by the court to explain her “dilemma,” juror #9 made clear that she had a problem and wanted to be removed from the jury because of her conscience. As in Johnson, the discussion of extraneous information that amounted to a “dilemma“ and upset the juror’s “conscience” (RP 268) were sufficient to require the court to remove the juror to avoid the possibility that her

information “could have affected the jury's determination”. .” Johnson, 137 Wn. App. at 869-70. The doubt raised by juror #9’s repeated attempt to articulate her concerns to the court must be resolved against the verdict. Briggs, 55 Wn. App. at 55.

a. Juror Unfitness

In Washington State, the determination of whether a juror is fit to serve is governed by statute:

It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, **inattention** or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

(emphasis added) RCW 2.36.110. CrR 6.5 requires the judge to seat an alternate juror when another juror is unfit to serve. CrR 6.5 provides in part: “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged.” Id. (Emphasis added.) “RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to

perform the duties of a juror.” State v. Jorden, 103 Wn. App. 221, 226-27, 11 P.3d 866, rev. denied, 143 Wn.2d 1015, 22 P.3d 803 (2001).

Review of the standard of proof used by the judge in determining whether or not to dismiss a juror under RCW 2.36.110 is a question of law reviewed de novo. State v. Elmore, 121 Wn. App. 758, 767-68, 123 P.3d 72 (2005). (error to dismiss a juror unless judge is certain that the juror misconduct is not related to his or her evaluation of the evidence). The determination of whether or not to dismiss a juror is reviewed for an abuse of discretion. *Id.*

A trial court abuses her discretion by refusing to excuse a juror who is sound asleep during cross examination of the state’s primary forensic expert. Jorden, 103 Wn. App. at 226, 230; Accord, Elmore, 155 Wn.2d at 761.

In Jorden, the Court of Appeals citing to RCW 2.36.110 and CrR 6.5 held that the judge’s removal of a juror for sleeping was not an abuse of discretion because “the record establishes that the juror engaged in misconduct.” Jorden, 103 Wn. App. at 229-230. The record in Jorden included the prosecutor’s and the judge’s observations of the juror sleeping during several days of testimony in the first degree murder trial. Jorden, 103 Wn. App. at 229.

Even though the juror in Jorden was observed sleeping more than the juror in the instant case, the Court, citing to United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983), a case decided on constitutional grounds, recognized that “[m]ost importantly, the allegation [of sleeping during testimony], if true, prejudiced Barrett's right to a fair trial; he was convicted by a jury that included one member who had not heard all the evidence.” Jorden, 123 Wn. App. at 228.

In Mr. Smith's case, the issue was not a sleeping juror, but juror unfitness due to an unknowable “dilemma” and problem with conscience”. These problems create juror unfitness just as a sleeping juror does, because ultimately the juror is unable to execute her duty to her unfitness, be it inattention or bias or prejudice. RCW 2.36.110. Juror # 9, s issue and juror #5's pressuring juror # 9 denied Mr. Smith his right to a fair trial and his convictions must be reversed.

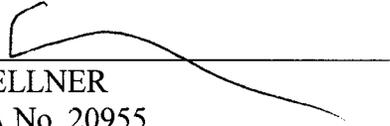
D. CONCLUSION

Mr. Smith respectfully requests this Court reverse his convictions for theft in the second degree and possession in the second degree for insufficient evidence and dismiss the charges with prejudice. In the alternative, Mr.

Smith's request this Court reverse the charges and remand for a new trial based on ineffective assistance of counsel and jury unfitness..

DATED this 27th day of January 2009.

Respectfully submitted,



LISE ELLNER
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Kevin H. Smith 2618 70th Ave. #18 University Place, WA 98466 Service was made on January 27, 2009 by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

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