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DIVISION II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN HOWARD SMITH, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan Serko, Judge

No. 07-1-05352-4

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was sufficient evidence adduced to uphold the jury's verdict finding defendant guilty of possession of stolen property in the second degree?
2. Was sufficient evidence adduced to uphold the jury's verdict finding defendant guilty of theft in the third degree?
3. Has defendant failed to meet his burden of showing deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?
4. Did the trial court properly deny a motion for mistrial asserting juror misconduct when there was no evidence of any misconduct?

B. STATEMENT OF THE CASE.

1. Procedure

On October 17, 2007, Pierce County Prosecutor's Office charged Kevin Smith, hereinafter "defendant," with one count of first degree theft, and one count second degree possession of stolen property in Pierce County Cause No. 07-1-05352-4. CP 1-2. On July 24, 2008, the State filed an amended information charging defendant with one count of second degree theft, and once count second degree possession of stolen property. CP 3-4.

The case was assigned to the Honorable Susan K. Serko for trial.

RP 3. On July 25, 2008, shortly after jury deliberations had begun, Juror #9 expressed that she had some concerns to the judicial assistant. RP 268. Once in the courtroom, it appeared to the court that the juror was emotionally distraught. RP 270. Juror No. 9 indicated that she was worried about a hung jury and indicated that she was uncertain about whether she could deliberate toward a verdict. RP 270. The court asked Juror No. 9 if she could deliberate in a fair and impartial manner and received an affirmative response from the juror. RP 271. The court indicated to the juror that she should not be concerned about a hung jury, especially because the jury had only been deliberating an hour at that point. RP 272. The court inquired into whether anything had happened outside the court proceedings that influenced her opinion or caused her concern; Juror No. 9 responded in the negative. RP 273. Juror No. 9 indicated that she could “go in and deliberate my position. I don’t have a problem with my position and I don’t have a problem articulating it.” RP 272. The court instructed Juror No. 9 to continue to deliberate in a fair and impartial manner and suggested that she reread instruction number 1. RP 276-77. Neither side objected to the court’s action or made any motion relating to Juror No. 9’s disclosure at this time. RP 277.

That same afternoon, the court received information that the presiding juror was expressing concern about Juror No. 9's willingness to continue deliberations, and in response had decided to break off deliberations for the weekend and return at 9:00 on Monday morning. RP 286-297. The court indicated that it was pleased with the decision of the jury to take a break, and that the court would not entertain any request for Juror No. 9 to be replaced at this time. RP 297. Defense counsel moved for a mistrial on the grounds that Juror No. 9 was feeling pressured. RP 298. The court denied the motion, noting that a juror feeling pressured to change his or her position is not unusual in our justice system. RP 298.

On July 28, 2008, the jury returned verdicts finding defendant not guilty of second degree theft, but guilty of third degree theft, as well as guilty of possession of stolen property in the second degree. CP 36-38. On July 28, 2008, the court sentenced defendant to 30 days confinement on the possession of stolen property conviction. CP 44-55. On the misdemeanor, the court imposed 30 days confinement to run concurrently with the felony sentence, and suspended the remainder of the one year sentence upon certain conditions. CP 39-43, 44-55; RP 320.

Defendant filed a timely notice of appeal. CP 56.

## 2. Facts

Shortly after 3 p.m. on May 9, 2006, a Mitsubishi, a Hummer, and a third car that was being driven by defendant, drove into a Shell station located at 8433 South Hosmer St. in Tacoma, Washington. RP 35, 38, 39, 49, 51. Defendant paid for gas for two of the vehicles with a Voyager fleet credit card. RP 39-40. Defendant attempted to pay for gas for the third vehicle, but security features refused to authorize the card. RP 39-40. Voyager fleet cards are credit cards assigned to government agencies to be used for official use only in putting gasoline into government vehicles. RP 62, 67. Dwayne Schroeder, owner of the gas station, became suspicious because it was unusual for one person to use a single Voyager fleet credit card at three pumps for three different vehicles - none of which appeared to be government vehicles. RP 39-40, 54. Mr. Schroeder knew the same credit card was being used because every transaction is registered, indicating the type of card, the time it was used, and the card authorization number. RP 36, 40. Mr. Schroeder also knew that multiple transactions over a short period of time on a single card can be sign of possible fraud. RP 67.

Mr. Schroeder went outside and wrote down the license plate numbers, descriptions of the vehicles and of the people involved in the suspicious transactions. RP 39-40, 45. Mr. Schroeder described the individual who had the credit card as a “young, African American man, not 30 years old, slight build and less than six foot tall.” RP 44. Mr. Schroeder saw the man take the card out of his pocket and authorize the pumps. RP 44-45. Mr. Schroeder identified the defendant as the man who took the card out of his pocket and paid for gas with the Voyager card. RP 45-46. Mr. Schroeder thought the car defendant was driving was a Chrysler, and wrote down the license plate number as 598 KDY. RP 52, 56. The transactions were recorded on a security videotape. RP 40. One of the other license plate numbers Mr. Schroeder wrote down was 779 UVB, but no vehicle with that plate number was involved with the transaction. RP 55. The amounts charged for the two transactions that went through were approximately \$34.00 and \$44.00. RP 55. Mr. Schroeder testified that the driver of the car with license plate number 598 KDY authorized the transactions and physically possessed the card. RP 56. Mr. Schroeder called Voyager and reported the possible fraudulent use. RP 40.

Each Voyager fleet card contains the notation that the cards are “for government use only” and “for Government Service Administration.” RP 148. Charges made on a Voyager fleet card can be tracked using the fleet commander database; this will trace a transaction on a fleet card back to a particular governmental agency authorized to use that card. RP 63. The Voyager fleet card used in the Shell station transaction on May 9, 2006, had been issued to Commander Submarine Group 9 in Bangor, Washington. RP 151, 153.

Stanley Larive was the Assistant Supply Officer at Commander Submarine Group 9 during this period. RP 147. Mr. Larive learned of misuse associated with a Voyager fleet card assigned to his unit in early summer 2006. RP 151. He testified that the unit’s Voyager fleet cards were kept in a file cabinet in the supply office in the Commander’s building. RP 149, 152. It is possible to charge using the card without having physical possession of the card. RP 199. After being notified of the fraudulent use, Mr. Larive discovered that two cards were missing out of the file cabinet. RP 151. Mr. Larive was not sure how the cards went missing. RP 151-52.

In May of 2006, Special Agent Christopher Bjornstad, with United States General Services Administration, was alerted to possible fraudulent use associated with a Voyager fleet card at the Shell Station on South

Hosmer. RP 64-65, 74, 77. Agent Bjornstad went to speak to Mr. Schroeder and collect the transaction receipts. RP 77. The receipts contained Mr. Schroeder's hand written notations of the license plate numbers associated with the transactions. RP 77-78. Agent Bjornstad collected a video cassette showing surveillance of the reported transactions. RP 78. The Voyager fleet credit card used in the reported transaction had the last four digits of 9836. RP 79. The receipts produced by Mr. Schroeder matched the transactions that showed up in the Voyager fleet database. RP 79. The receipts caused Agent Bjornstad concern because: the transactions on the card occurred within one minute of each other; the license plate numbers listed on the receipts did not appear to be Government issued; and the odometer readings in both instances were imputed as "zero." RP 80. Agent Bjornstad testified that inputting an odometer reading of zero "is always an indicator of misuse." RP 80.

The video surveillance and receipt transactions collected by Agent Bjornstad were stored in the field office. RP 78. Agent Bjornstad converted the relevant portion of the surveillance footage from a video cassette tape into digital format, which he saved on a compact disk. RP 81-83. Agent Bjornstad chose to convert the footage so he could review the images in slow motion and pause the footage, without risk of damaging the video cassette tape. RP 81. Agent Bjornstad took the

license plate numbers obtained by Mr. Schroeder and contacted the Department of Homeland Securities Federal Protective Services, and retrieved the registration information for the license plates. RP 87-88. Agent Bjornstad learned that the registered owner of one of the vehicles, license plate number 598 KDY, was the defendant. RP 96, 213. The license number was the same number that was marked on the receipt that Mr. Schroeder provided. RP 96. Agent Bjornstad contacted other vendor locations regarding additional transactions involving the Voyager card ending in 9836 occurring between May 9, 2006, and June 26, 2006. RP 89. He obtained video surveillance recordings from some of those locations. RP 89.

Agent Bjornstad obtained video surveillance for two transactions that occurred on May 17, 2006, at a Shell store located at 1430 72<sup>nd</sup> Street East, Tacoma, WA. RP 89. Agent Bjornstad talked with the assistant store manager who witnessed the transactions on this date and obtained reprinted receipts from the transactions. RP 90, 97. These receipts showed a Voyager fleet card, with the last four digits 9836, was used in both instances. RP 92. The odometer reading was at zero in both instances. RP 92. The amounts for the two May 17, 2006, transactions were \$38.48 and \$32.73. RP 105. There was approximately one and a half minutes between the two transactions. RP 106. The transaction

receipts have remained in Agent Bjornstad's custody since he collected them. RP 91.

The assistant store manager of the Shell station on 72<sup>nd</sup> St. identified a vehicle, matching the description of the vehicle with license plate number 598 KDY, as associated with the transaction. RP 104. Video from this store was in digital format, so Agent Bjornstad recorded the relevant portions of the video surveillance from the around the time of the transaction, onto a compact disk. RP 90. The surveillance video showed two cars being fueled. RP 93. The video contained a date and time stamp of May 17, 2006, at 10:31 a.m. RP 99. Agent Bjornstad looked at the receipts to determine the appropriate times to view on the surveillance video. RP 100. The surveillance video was approximately 10 minutes ahead of the sales register. RP 100. Agent Bjornstead was later able to identify the defendant's vehicle at the store during the time of the suspect transaction. RP 101.

On June 2, 2006, Agent Bjornstad took photographs of defendant's vehicle. RP 102. Defendant's vehicle had "unique damage" to the rear, driver's side, taillight/trunk area. RP 102-03. The vehicle had tinted windows. RP 103. The vehicle in the surveillance video from the Shell station on 72<sup>nd</sup> St. resembled the vehicle in the photographs as evidenced by: tinted windows, shape of the vehicle, tires, trunk raised, and the same

unique damage to the taillight/trunk area. RP 103. Based on the receipts from the gas station at 1430 72<sup>nd</sup> St., the video, and the pictures, Agent Bjornstad determined that that vehicle was the vehicle registered to defendant with license plate number 598 KDY. RP 104. The vehicle was the same vehicle that was identified from the Hosmer gas station transaction. RP 104-105.

Another Voyager transaction for \$34.27 occurred on May 23<sup>rd</sup>, 2006, at a Shell station located at 5610 Orchard, Tacoma, WA. RP 105, 107, 109, 123. On May 31, 2006, Agent Bjornstad went to the station and talked with the store manager. RP 106. Agent Bjornstad obtained receipts for the relevant transactions and matched those dates and times with the surveillance system of the store. RP 106. Agent Bjornstad copied the relevant video files to compact disks. RP 107. Based on the similar features of the vehicle and damage to the rear of the vehicle, Agent Bjornstad concluded the vehicle on the video was defendant's vehicle. RP 124.

On May 28, 2006, defendant's vehicle was involved in another Voyager transaction at the same Shell station on 5610 Orchard St, Tacoma, WA. RP 109-10, 163, 166. The amount purchased for this transaction was \$60.15. RP 109, 136. The video surveillance recording showed defendant's vehicle involved in the transaction. RP 136, 163.

Agent Bjornstad compared the transaction receipt from the store to the date/time on the surveillance video. RP 164. Agent Bjornstad identified defendant's car as the vehicle in the video based on wheel pattern, overall shape, color of the vehicle, and tinted windows, and damage to the left rear of the vehicle, and the slightly raised trunk. RP 165.

On June 2, 2006, while Agent Bjornstad was conducting surveillance on defendant's vehicle, defendant and a female drove to a Shell store located at 1401 So. Sprague. RP 112-13, 189. Defendant and the female pulled in and parked at pump number 8. RP 113. Defendant got out of the car and walked over to pump number 4, where another vehicle was parked. RP 113. Defendant accessed the key pad, removed the pump, and appeared to be filling up the other vehicle. RP 113-14, 133. In addition to taking video and photographs of this transaction, Agent Bjornstad obtained video cassette surveillance video from the store. RP 114-15. The video showed defendant and defendant's vehicle, license plate 589 KDY. RP 128-130. Defendant fueled the other vehicle with the Voyager fleet card. RP 132. The total cost of the transactions was \$40.13. RP 135. The video of the transaction corresponded with the transaction in Voyager database. RP 135. The video of the transaction was consistent with Agent Bjornstad's personal observations. RP 162-63.

There were more transactions on June 4, 2006, and on June 6, 2006, at a shell station at 3740 Pacific Ave. So. RP 118, 136-137. The transaction on June 4, 2006, was for \$45.04. RP 137, 170. There was a video for the June 4, 2006 transaction. RP 166. The defendant's vehicle was identified at the station at the time of the transaction on June 4, 2006. RP 166-67. Agent Bjornstad matched the transaction receipt to the surveillance video date and time to verify the time the transaction occurred. RP 167. The surveillance system was approximately 29 minutes ahead of the store receipt. RP 167. This transaction involved fueling a vehicle other than the defendant's vehicle. RP 168. The vehicle in the video had damage to the rear of the vehicle, a raised trunk, and a damaged rear taillight. RP 169. The transaction in the video was consistent with the transaction that showed up in the Voyager database. RP 170.

There were other transactions on the Voyager card that Agent Bjornstad was unable to get video for. RP 170. Agent Bjornstad obtained photos for Voyager transactions occurring on May 12, 2006, May 16, 2006, and May 17, 2006, at 1401 Sprague Ave. RP 171-72. There were two transactions that occurred on May 12, 2006. RP 176. A photograph for one of the transactions that occurred on May 12 showed characteristics

similar to defendant's vehicle. RP 172, 176. The color, shape, and wheel pattern were similar to the subject's vehicle. RP 176. The transaction was for the amount of \$39.65. RP 173. The transaction receipt coincides with the date/stamp on the photograph. RP 173.

On May 16, 2006, there were two Voyager transactions. RP 176. Agent Bjornstad was not able to make any conclusions regarding one of the transactions on that day, other than it was for the relevant time period. RP 176-77. In the other transaction, an SUV was photographed that was consistent with an SUV Agent Bjornstad had observed in other transactions. RP 177. Agent Bjornstad correlated the dates and times with the Voyager fleet data card for the transactions that occurred at 1401 So. Sprague. RP 177. In all, ten stores were involved in the investigation regarding this Voyager fleet card. RP 162. The defendant's vehicle was seen, either by a witness or captured on a security video, at eight of these transactions. RP 175-179. Agent Bjornstad focused his search on the subject vehicle because it appeared more frequently during the transaction times than the other vehicles. RP 211-12. It was also the focus of the search because it was the vehicle listed in the initial complaint on the card. RP 212.

Agent Bjornstad was confident the car in the various surveillance videos was the same car, based on his personal observations and the fact

that vehicle had some distinctive damage to it. RP 212. Defendant had a 1999 Buick Sedan. RP 178. The license plate number on the initial report and the license plate number on the subject vehicle as evidenced by photographs shown in exhibit 25, were different. RP 213. While the license plate numbers were different, there was the distinctive damage to the vehicle by which to conclude it was, in fact, the same vehicle. RP 212-13.

The defense did not present any evidence. RP 217-218.

C. ARGUMENT.

1. THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND DEFENDANT COMMITTED THE CRIMES OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE AND THEFT IN THE THIRD DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met

the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. Sufficient evidence supported the jury's verdict finding defendant guilty of possession of stolen property in the second degree.

To convict defendant of possession of stolen property in the second degree, the State had to prove the following elements beyond a reasonable doubt:

- (1) That on or about the period May 9, 2006 to June 26, 2006 the defendant knowingly possessed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the stolen property was an access device;
- (5) That the acts occurred in the State of Washington.

CP 11-35, Instruction No. 15. Defendant challenges only two of these elements; he contends there was insufficient evidence to prove that he was *the person* who possessed the access device and insufficient evidence that he had *possession* of the access device.

Identity presents “a question or fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.” *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618, 619 (1974). Here, Mr. Schroeder identified defendant as the person he saw using a credit card at his gas station on May 9, 2006, to put gas into three cars that did not appear to be government vehicles; the number of the card used to purchase this case matched the Voyager fleet card that was missing from a military supply office. RP 35-46. Officer Bjornstad also witnessed defendant obtaining gas using the access card number on June 2, 2006. RP 112-114. Additionally, the jury had videotapes of many of the charged transactions, which showed the defendant or his vehicle at the pumps at the time of the questioned transactions. RP 162, 179; EX. NO. 6, 7, 12, 13, 14, 15, 16, 17, 24. This was sufficient evidence to support the jury’s finding that defendant was the person improperly using the missing Voyager fleet card.

This evidence also supports the element of possession. “Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that person charged with possession has dominion and control over the goods.” *State v. Callahan*, 77 Wn.2d. 27, 29, 459 P.2d 400 (1969) (citing *State v. Walcott*, 72 Wn.2d

959, 435 P.2d 994 (1957)). The evidence in this case overwhelmingly supports that defendant possessed the stolen Voyager fleet card. Mr. Schroeder testified that he saw defendant using a card to “pay” for the gas at the pumps. RP 44-45. The same card number was used to pay for numerous other transactions at different locations where the defendant or his car could be seen at the pump at the relevant time. RP 162, 179. Agent Bjornstad witnessed defendant punching the pad used with an access device on June 2, 2006, at a time where the Voyager card was being charged for a gas purchase. RP 112-114. Through his investigation, Agent Bjornstad was able to identify defendant’s vehicle was at the location where the Voyager fleet card was used - at the time it was used – on eight different occasions. While it was possible to charge the account using a number, without having the access device in one’s physical possession, the jury could find that charging to the account in this manner showed constructive possession of the access device. From all of the evidence before the jury, it was reasonable to infer that defendant was in either actual or constructive possession of the access device during the relevant time period.

- b. While Defendant Challenges The Sufficiency Of The Evidence To Prove Theft In The Second Degree, The Jury Acquitted Of This Charge And Convicted Of The Lesser Degree Crime Of Theft In The Third Degree; the Prosecution Presented Sufficient Evidence For A Rational Trier Of Fact To Find Defendant Committed The Crime Of Third Degree Theft.

Defendant challenges the sufficiency of the evidence to convict him of theft in the second degree. Appellant's brief at p. 10, 22-23. The jury found defendant not guilty of this charge and convicted him of the lesser degree crime of theft in the third degree. CP 36, 37. The State will address defendant's challenge as attacking his conviction for theft in the third degree. To convict the defendant of third degree theft, each of the following elements had to be proved beyond a reasonable doubt:

- (1) That on or about the period the [sic] 9<sup>th</sup> of May 2006 to the 26<sup>th</sup> day of June 2006, the defendant or an accomplice, wrongfully obtained or exerted unauthorized control over property or services of another of a value not exceeding \$250;
- (2) That the defendant intended to deprive the other person of the property[or services]; and
- (3) That the acts occurred in the state of Washington.

CP 11-35, Jury Instruction 12.

Here, there was substantial evidence defendant committed third degree theft of gasoline. To prove the identity element of the crime, Mr. Schroeder identified defendant as authorizing two transactions with the Voyager Fleet card at his service station on May 9, 2006. Additionally, Agent Bjornstad witnessed defendant charge a fuel purchase on June 2, 2006, while there was a corresponding charge made to the Voyager fleet card in question.

Voyager fleet cards are marked “for government use only” and “for Government Service Administration,” yet the gasoline was being put into private vehicles. The jury could infer the defendant knew that he was misusing the card, because the cards are clearly marked, that he would not have received any bills for the transactions. This is sufficient evidence from which the jury could infer that defendant wrongfully obtained or exerted unauthorized control over gasoline by improperly using the access advice for non-governmental purposes.

The evidence of defendant’s repeated use of the card shows that he was intending to deprive the business owners of their property [gasoline] by fraudulent use of the access device. Defendant made no effort to pay for the gasoline legitimately by paying with his own funds at the gas station. Nor was there any evidence that defendant made any effort to repay the government for his unauthorized use of the Voyager fleet card. Alternatively, the jury could conclude that defendant was trying to deprive the federal government of its property as he neither put the

gasoline into government fleet vehicles, nor made any effort to repay the government for the cost of the gas he purchased. From the evidence before it, the jury could properly conclude that defendant intended to obtain gasoline without paying for it himself, and that he did not care whether he was depriving the business owner or the government from use of its property. This is sufficient evidence to prove the defendant intended to deprive another of property.

There was considerable evidence that the unauthorized transactions occurred at gas stations located in Tacoma, Washington. RP 35, 77, 89-91,105-110, 113. This court should find sufficient evidence to affirm the conviction for theft in the third degree.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE **STRICKLAND** STANDARD.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the

adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if

the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for his failure to object to admission of certain videos and DVDs, Exs. 3, 6, 7, 12, 13, 14, 15, 16, 17, 19, 23<sup>1</sup>, on the basis of an insufficient chain of custody.

“A sufficient foundation for the admission of evidence can be established even without proof of an unbroken chain of custody.” *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998). The moving party does not need to identify the evidence with absolute certainty, or eliminate every possibility of alteration or substitution before the court may admit the evidence. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002); *see also, State v. McGinley*, 18 Wn. App. 862, 866-867, 573 P.2d 30 (1977) (It is not necessary for the State to negate every possibility of tampering with the exhibits by means of the testimony of each custodian).

In order to be properly admitted into evidence, a physical object connected with the commission of a crime must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

The court should consider various factors, including (1) “the nature of the

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<sup>1</sup> While defendant’s arguments discuss videos and DVDs of security tapes, Exhibit 23 does not fit into either category. Exhibit 23 is a form that would be completed and signed by persons authorized to take a Voyager access card for use. RP 150.

article,” (2) “the circumstances surrounding the preservation and custody” of the article, and (3) “the likelihood of [ ] tampering” or alteration.

**Campbell**, 103 Wn.2d at 21 (quoting **Gallego v. United States**, 276 F.2d 914, 917 (9th Cir.1960)). Deficiencies in the chain of custody, minor discrepancies, or a witness's uncertainty, affect only the weight of the evidence and not its admissibility. *Id.*

An appellate court reviews a trial court's admission of evidence that requires proof of chain of custody for abuse of discretion. *See Campbell*, 103 Wn.2d at 21. The trial court abuses its discretion only if its decision is manifestly unreasonable or is based on untenable reasons or grounds. **State v. Mason**, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

Here the record showed that the station owner, Mr Schroeder, identified Exhibit No.3 as being one of his 24 hour security videotapes from his business which showed the questioned transaction on May 9, 2006; he testified that he gave this to the special agent investigating the case. RP 38, 41-42. The special agent also identified the Exhibit 3 as one he had collected from Mr. Schroeder, and which had been maintained within his field office. RP 78. He indicated that he reviewed the videotape, then used special equipment that allowed him to duplicate the images it contained into a digital format. RP 81-83. The special agent indicated that Exhibit 6 contained the relevant portions of Exhibit 3 in this digital format, and that this duplication process does not modify the original tape. RP 83. Thus, all of the contents of Exhibit 6 were also

contained in Exhibit 3, but in a different format. Mr. Schroeder also testified from personal recollection about the events depicted in Exhibit 3 and 6. RP 35-67.

As for Exhibit 7, the special agent described how he acquired the images on that exhibit by copying them from a digital store security system that recorded the events of May 17, 2006; he indicated that this exhibit remained in his custody at his field office since that time. RP 90-91, 97-101. The special agent indicated that he used the same process to obtain the images on Exhibits 12 and 13 which recorded events occurring on May 23 and 28, 2006, respectively. RP 105-110. The special agent indicated that Exhibit 14 was a gas station's video tape surveillance made of events on May 30, 2006, and that Exhibit 15 was a gas station's video tape surveillance made of events on June 2, 2006. RP 116-117. The special agent identified Exhibits 16 and 17 as digital copies of surveillance video that he had recorded on June 2, 2006. RP 110-114, 128-134. The special agent indicated that the Exhibits 16 and 17 documented most of what he had witnessed that day, although there were gaps where he had stopped recording because he was concerned that the defendant might see him with the camera. RP 129-130, 162-163. The special agent indicated that the contents of the two exhibits were for the most part the same, although in slightly different digital formats. RP 110-114. The contents of Exhibits 16 and 17 included the same transaction that was documented on the store security system in Exhibit 15, and that his review of 15

showed that it was consistent with his recollection of those events. RP 162-163. The special agent indicated that Exhibit 19 was a gas station's video recording of events on June 4 and 6, 2006. RP 117-118.

While the chain of custody on these exhibits could have been documented more thoroughly, defendant cannot show from this record that the court would have sustained an objection on chain of custody grounds had one been made. Under *Roche*, moving party does not need to identify the evidence with absolute certainty or eliminate every possibility of alteration or substitution before the court may admit the evidence. The record indicates that the agent received the video recordings directly from the business or that he copied relevant images from the store's security system. The evidence was then kept in his custody at his field office. Moreover, the court was aware that the jury would hear testimony about the two transactions documented on Exhibits 3, 6, 15, 16 and 17 from Mr. Schroeder and Special Agent Bjornstad. The contents of the tapes could be compared against this testimony. Defense counsel was able to cross examine Agent Bjornstad regarding the video footage he took of defendant, and inquired into whether any changes had been made to the video taken on June 2. RP 192. This record shows a sufficient chain of custody to admit the evidence. As any deficiencies in the chain of custody went to weight and not the admissibility of this evidence, the court would have overruled any objection. Defendant cannot show that his attorney was deficient for failing to make a non-meritorious objection. Finally as

there was testimony regarding the transactions on May 9 and June 2, 2006, any error admitting Exhibits 3, 6, 15, 16, and 17 would have been harmless as the content of this information would have been cumulative of the testimony of Mr. Schroeder and Agent Bjornstad. Defendant has also failed to show resulting prejudice.

But to focus on defense counsel's failure to object on chain of custody grounds is to lead the court away from the proper standard of review under *Strickland* and its progeny. The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

The entirety of the record reveals that defendant received his Sixth Amendment right to counsel. The record indicates that counsel was prepared and had reviewed all of the video surveillance evidence prior to trial. RP 4, 8-12. He made a successful motion in *limine*. RP 27-33. Although the substance of the opening statement is not included in the record on review, the record does reflect that defense counsel gave an opening statement. RP 34. Counsel cross-examined the State's witnesses, RP 47- 55, 153-159, 181-202, 206-211, 216-217. For example,

defense counsel challenged the quality of the investigation by asking whether the special agent had followed up by investigating three individuals who would have had access to the area where the cards were kept. RP 207. Defense counsel proposed relevant jury instructions. RP 22-23, 219-232; CP 7-8. He made a coherent closing statement that demonstrated he had a theory of the case that he had employed throughout the trial - challenging the quality of the State's proof. RP 244- 252. Defense counsel obtained a not guilty verdict on the charge of theft in the second degree. CP 36. This record demonstrates that defendant was represented in a manner that tested the State's case. Looking at the entirety of the record, defendant cannot meet his burden on either prong of the *Strickland* test.

3. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR MISTRIAL WHEN THERE WAS NO SHOWING OF JUROR MISCONDUCT.

A trial court has wide discretion to cure trial irregularities. *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Consequently, an appellate court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial based upon a trial irregularity. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A reviewing court will find abuse of discretion when the judge's decision "is manifestly unreasonable or

based upon untenable grounds.” *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's denial of a motion for mistrial will only be overturned when there is a "substantial likelihood" that the error prompting the mistrial affected the jury's verdict. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

The constitutional standard of fairness set forth in the Fourteenth Amendment's Due Process Clause requires that a defendant be tried by a panel of impartial, "indifferent" jurors. *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L.Ed.2d 589 (1975). In Washington, the right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989); *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). Due process does not require a new trial every time a juror has been placed in a potentially compromising situation, as it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982). Rather, "[w]hen a trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury." *Williams v. Bagley*, 380 F.3d 932, 945 (6th Cir. 2004).

The United States Supreme Court has stated that the remedy for allegations of juror partiality based on unauthorized juror contacts is a hearing in which the defendant has the opportunity to prove actual juror bias. *Smith*, 455 U.S. at 215 (citing *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L.Ed.654 (1954)). A *Remmer* hearing is required “in all cases involving an unauthorized communication with a juror or the jury from an outside source that presents a likelihood of affecting the verdict.” *United States v. Rigsby*, 45 F.3d 120, 123 (6th Cir.), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2015, 131 L.Ed.2d 1013 (1995). A *Remmer* hearing is not constitutionally required in every circumstance where allegations of jury misconduct are raised. *Id.* at 124. At a minimum, a juror must discuss the pending case with a non-juror to create misconduct. *State v. Brenner*, 53 Wn. App. 367, 372, 768 P.2d 509 (1989). The trial court enjoys wide discretion in determining the amount of inquiry, if any, that is necessary to respond to such allegations. *United States v. Logan*, 250 F.3d 350, 378 (6th Cir.), *cert. denied*, 534 U.S. 895, 122 S. Ct. 216, 151 L.Ed.2d 154 (2001); *see also*, *United States v. Romero-Avila*, 210 F.3d 1017, 1024 (9th Cir. 2000)(district courts are not required to hold evidentiary hearings each time there is an allegation of jury misconduct).

In *Tanner v. United States*, 483 U.S. 107, 116-34, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987), the Supreme Court held that the trial court’s failure to hold a post-verdict hearing based on certain jurors’ allegations that

some jurors consumed alcohol and drugs during recesses of the trial did not violate the defendant's Sixth Amendment right to a fair and impartial jury. The Court distinguished cases involving an "extrinsic influence or relationships" from cases involving an inquiry into the "internal processes of the jury." *Id.* at 120. This distinction is necessary to preserve "one of the most basic and critical precepts of the American justice system: the integrity of the jury." *Logan*, 250 F.3d at 379; *see also, Tanner*, 483 U.S. at 119-20. The Court found that the defendant's Sixth Amendment interest in an impartial, "unimpaired" jury was protected by "several aspects of the trial process," including voir dire and the opportunity for jurors and court personnel to report observable inappropriate juror behavior before a verdict is rendered. The Court stressed that the distinction made between external and internal influences on the jury is not based on whether the juror was inside or outside the jury room when the alleged misconduct occurred, but rather on the "nature of the allegation." *Tanner*, 483 U.S. at 117-18.

It is generally considered less serious if the misconduct allegation does not involve outside influences or extraneous information. *See, United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir. 1974). Claims that do not involve an outside or extrinsic influence, but rather only a potential intra-jury influence, are not subject to a *Remmer* hearing or further inquiry by the trial court. *United States v. Briggs*, 291 F.3d 958, 963 (7th Cir.) (affirming district court's denial of motion for post-verdict hearing based

on a juror's allegations that jurors and the jury foreman behaved improperly during deliberations, including exerting "extreme and excessive pressure on individuals to change votes"), *cert. denied*, 537 U.S. 985, 123 S. Ct. 458, 154 L.Ed.2d 350 (2002); *United States v. Prosperi*, 201 F.3d 1335, 1340-41 (11th Cir.)(district court's refusal to grant mistrial or an inquiry into alleged misconduct by two jurors engaged in a "heated discussion" away from the other jurors did not amount to an abuse of discretion and, in fact, would have "invited reversible error" if a contrary decision had been made), *cert. denied*, 531 U.S. 956, 121 S. Ct. 378, 148 L.Ed.2d 292 (2000); *see also*, *United States v. Yoakam*, 168 F.R.D. 41, 45-46 (D. Kan. 1996)(denying request for investigation based on allegations of juror misconduct obtained from courthouse guard, who overheard two jurors participating in a "heated discussion" concerning their deliberations).

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. *State v. Hawkins*, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. *State v. Havens*, 70 Wn. App. 251, 255-56, 852 P.2d 1120, *review denied*, 122 Wn.2d 1023 (1993). Not all instances of juror misconduct merit a new trial; there must be prejudice. *State v. Barnes*, 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997); *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

A trial court faces a delicate situation when the allegations of potential misconduct stems from a dispute between jurors as the dispute might stem from a disagreement about the case. *United States v. Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999); *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). This is because a trial judge must not compromise the secrecy of jury deliberations. *Symington*, 195 F. 3d at 1086.

As the record below does not support a conclusion that any juror misconduct occurred, it must follow that the trial court did not abuse its discretion in denying the motion for mistrial premised upon juror misconduct. Defense counsel moved for a mistrial because “just given the nature of the communication and that the juror feels pressured.” RP 298. Defendant seems to be alleging that Juror 9 was subjected to pressure or harassment from another jury member, and that this made her unfit to serve. The record shows, at most, that Juror No. 9 felt emotional about the deliberation process and could see that she felt differently about the evidence than her fellow jury members, and that there was some pressure for her to change her viewpoint. RP 269-270, 296. This does not indicate that she felt harassed or undue pressure. Moreover, defendant presents no authority - and the State is aware of none - that some jury members trying to convince another juror to change her view of the evidence constitutes “misconduct.” This is part of the deliberation process. As the above cases indicate, while discussions in the jury room may get heated, this

does not indicate that there is any misconduct that must be investigated by the trial court. Rather, the cases indicate that the court should refrain from investigating into these intra-jury matters that involve the deliberative process.

Defendant also cites cases that concern: 1) when a juror has failed to disclose information relative to a possible bias during voir dire, but does disclose the information during deliberations; and 2) where a juror has brought extraneous information into the jury room during deliberations. Defendant does not cite to anything in the record below that would make these cases relevant to the issues before this court. Finally, defendant asserts that Juror No. 9 was inattentive and should have been dismissed under RCW 2.36.110. Appellant's Brief at p. 38. Defendant asserts that Juror No. 9 was unfit "due to an unknowable 'dilemma' and problem with conscience'[sic]." Appellant's brief at p. 40. Without explanation, he asserts that Juror No. 9 was "unable to execute her duty to [sic] her unfitness, be it inattention or bias or prejudice." Defendant does not articulate what in the record shows that Juror No. 9 was inattentive or bias or prejudiced. The record suggests that she was very attentive during deliberations and quickly understood that she viewed the evidence in a different manner than the other jurors. Nevertheless, she still felt that she was fully capable of articulating her position and continuing with deliberations. RP 272. This record shows a very attentive juror and provides no evidence of either prejudice or bias. The trial court did not

abuse its discretion in denying the motion for mistrial based on juror misconduct when no misconduct had been shown.

D. CONCLUSION.

For the aforementioned reasons, Respondent respectfully requests this court affirm the judgment and sentence entered in this matter.

DATED: May 21, 2009.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

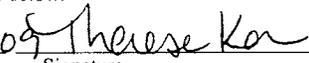
  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

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Alexis Taylor  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.22.09   
Date Signature

09 MAY 22 PM 3:34  
STATE OF WASHINGTON  
BY  DEPUTY  
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DIVISION II