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II. MS. DENNIS IS ENTITLED TO HAVE HER JUDGMENT AND SENTENCE CLARIFIED AS TO THE NO-CONTACT PROVISION FOUND IN PARAGRAPH 4.3.

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C. STATEMENT OF THE CASE

The Thurston County Prosecuting Attorney charged Heather Dennis with Theft in the First Degree. CP 3. Heather was an employee with the Washington State Parks Commission for approximately 14 years. RP III, p. 232. She began her career with the Parks Commission as a park ranger. Id. Part of her duties as a ranger was collecting money from the public. RP III, p. 234-35. During a typical summer she would collect in the neighborhood of \$80,000. RP III, p. 235. In her approximately 11 years as a park ranger there was never any allegation that she misused or misappropriated state funds. Id. In 2005 Heather sustained a back injury

while on the job and had to leave her position as a park ranger. RP II, p. 164.

Rather than go on disability, Heather chose to work and accepted a position as an administrative assistant at the Parks Commission headquarters. RP II, p. 67-68. Her transfer to the new position was called “reasonable accommodation.” Id. Heather was also receiving reasonable accommodation for post traumatic stress disorder. RP III, p. 258-59. Heather was supervised by Ted Smith but was unhappy working for him, and wanted to gain employment elsewhere in the agency or perhaps for another state agency. RP III, p. 267, 273. Heather was looking for a more challenging career. RP III, p. 250. Heather had purchasing authority for the Stewardship department of the Parks Commission and was entrusted with a state credit card with which to make those purchases. RP III, p. 251-52.

Heather became interested in court reporting and stenography and believed it could be useful to the Parks Commission. RP III, p. 237-38. She also realized it could be useful in another state agency. RP III, p. 267. Heather spoke to several people in the Commission about wanting to take a court reporting class at state expense. RP III, p. 237.

The State and Heather had different versions of what occurred. The State alleged that Heather used her state credit card to purchase a

training program entitled “Court Reporting at Home” from SSD Enterprises. RP II, p. 37-38. The State further alleged that she made this purchase without approval and the purchase was entirely for her personal use. CITE. The program cost \$4,034. RP II, 37.

Heather acknowledged purchasing the at-home training program but maintained that she received approval to do so from Mike Swigert, the Health and Safety Manager who had been assisting her with her reasonable accommodations. RP III, p. 238-242. Heather said that she spoke with Mike Swigert about the program and suggested that perhaps the state could agree to pay for the court reporting training program if she agreed to purchase the stenography equipment. RP III, p. 238-40, 260. In speaking with Mr. Swigert she got the impression that Mr. Swigert approved the purchase. RP III, p. 242, 259. She was aware that her immediate supervisor, Ted Smith, did not approve the expenditure but she believed it was largely due to him not wanting it to come out of his budget. RP 238-43. Heather maintained that Mr. Smith told her to talk to Mr. Swigert and see if there was anything he could do. RP III, p. 255-56. It was after that suggestion that she spoke to Mr. Swigert and believed he approved the expenditure. Id, 259. She acknowledged the permission was verbal, not written. RP III, p. 243. After making the purchase, she sent an email to Mr. Smith that she characterized as informational, which detailed

the training program. RP III, p. 254. Mr. Smith took it to be another request for authorization to purchase the equipment and denied it, but again suggested that she speak to Mr. Swigert to see if there was anything he could do. RP III, p. 273.

Mr. Smith and Mr. Swigert both testified for the State, and denied having given approval for the purchase of this program, either written or oral. RP II, p. 143-152, 175. Mr. Swigert acknowledged that he was a poor note-taker and had a poor memory of the conversation he had with Heather about the training program. RP II, 177-81. He recalled that the conversation took place in the hallway and that it was not a formal meeting. RP II, 174-76. Heather reported the purchase on a transaction log. RP III, p. 243-44. She also made a formal training request to receive this training. RP III, p. 255.

Defense counsel requested an instruction found at WPIC 19.08. RP III, p. 202-03.¹ The instruction provides:

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even though the claim be untenable.

The State has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved

¹ Defense counsel did not file a proposed instruction in written form. He made the request orally, and cited to WPIC 19.08 in his argument. The trial court denied the request and a written instruction was never submitted. Defense counsel excepted to the court's failure to give the instruction.

the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 19.08.

The Court refused to give the requested instruction. RP III, p. 209. Defense counsel excepted to the Court's failure to give this instruction. RP III, p. 278. The jury returned a verdict of guilty. CP 4. Heather received a standard range sentence. CP 20. She was ordered, in paragraph 4.3 of the judgment and sentence to have no contact with "WA State Parks Commission including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 10 years." CP 20. This timely appeal followed. CP 25.

D. ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE THE GOOD FAITH CLAIM OF TITLE INSTRUCTION REQUESTED BY MS. DENNIS.

"In general, the court must instruct on the party's theory of the case, if the law and the evidence support it, and its failure to do so is reversible error." *State v. May*, 100 Wn.App. 478, 482, 997 P.2d 956 (2000), citing *State v. Birdwell*, 6 Wn.App. 284, 297, 492 P.2d 249 (1972). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge

the witnesses' credibility, which are exclusive functions of the jury. *May* at 482, citing *State v. Williams*, 93 Wn.App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002 (1999).

Here, the State objected to the giving of the good faith claim of title instruction because the money used to purchase the court reporter program was the State's money. The Court held that the instruction is only available when the defendant is accused of recovering a specific item of property. RP III, p. 208-09. The Court relied upon *State v. Self*, 42 Wn.App. 654, 713 P.2d 142 (1986) to conclude that the defense is only available when self-help is used to recover specific property. RP III, p. 208. Because the theft here involved the use of credit card where there was "essentially an unliquidated amount with no specific cash involved." RP III, p. 209.

State v. Self is distinguishable. First, it was a robbery case, which is why it dealt specifically and exclusively with the taking (or "recovery") of a tangible item from the person of another. *Self* at 657. The use of a credit card to purchase an item or service would not be the subject of a robbery charge (the taking of the card itself might, but not its mere use where the person accused is an authorized holder of the card). *State v. Hicks*, 102 Wn.2d 182, 184, 683 P.2d 186 (1984) is similarly distinguishable insofar as it also was a robbery case and dealt with the

taking of tangible property from the person of another. It is instructive, however, where it quotes the holding in *State v. Steele*, 150 Wn.2d 466, 473, 273 P. 742 (1929):

It is fundamental, of course, that a defendant on trial for crime is entitled to have his version of the transactions thought to constitute the crime given to the jury, if such version tends to disprove his guilt. In robbery, as in larceny, it is essential that the taking be with a felonious intent, and unless it is so taken, the act of taking is not robbery.

Hicks at 186.

In *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995) the Supreme Court held the good faith claim of title defense, found at RCW 9A.56.020 (2) and codified in WPIC 19.08 negates the element of intent to steal “by providing that a defendant cannot be guilty of theft if the defendant takes property from another ‘under the good faith belief that he is the owner, or *entitled to the possession*, of the property. *Ager* at 92, citing *Hicks* at 184. (Emphasis added). Although *Ager* is also factually distinguishable in that it involved an allegation of embezzlement, it is the most factually comparable to Ms. Dennis’ case of the cases discussed by the parties and the Court in this case.

Here, the issue was not whether the money used to make the purchase was the State’s money, as the prosecutor asserted. Of course it was the State’s money; the case would not have been filed otherwise. The

issue was whether Ms. Dennis had a good faith claim of title to the money used to purchase the program based on the permission she believed she had been given by Mr. Swigert to make the purchase. There is no question the purchase was made openly and avowedly, as evidenced by the testimony of her co-worker Angela Harper who testified Ms. Dennis told her about purchasing the program (see RP III, p. 225-229), and by the fact that she recorded the purchase in the transaction log with the receipt attached.

The issue here was also not whether Ms. Dennis took tangible property from another on the belief it was her property. The very language of RCW 9A.56.020 (2) contemplates that this defense is not limited to cases in which a person takes a tangible item of property from another believing him or herself to be the owner. The statute refers to the taking of services as well as property. The Court's narrow reading of the statute in this case would have this defense limited to robbery cases and theft cases involving tangible items. Here, the trial court erred in not giving this instruction because the good faith claim of title alleged was the permission given to Ms. Dennis by Mr. Swigert to make the purchase. If the trial court did not believe Ms. Dennis actually had permission, and believed the State's witnesses instead, that is an invalid basis to deny the

instruction. That particular factual question was to be resolved exclusively by the jury. *May* at 482, *supra*.

“Erroneous instructions given on behalf of the party in whose favor the verdict is returned are presumed prejudicial unless it affirmatively appears they were harmless.” *Hicks* at 186-87, citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Here, the record does not affirmatively establish that the failure to give this instruction was harmless, and Ms. Dennis respectfully asks this Court to grant her a new trial.

II. MS. DENNIS' CASE SHOULD BE REMANDED FOR CLARIFICATION OF THE NO-CONTACT PROVISION FOUND IN PARAGRAPH 4.3.

The judgment and sentence, at paragraph 4.3, prohibits Ms. Dennis from having any contact with “WA State Parks Commission.” CP 20. This condition is vague because Ms. Dennis doesn’t know what is meant by “WA State Parks Commission.” Does that mean any and all employees of the Parks Commission? Or does that mean only those employees with whom she used to work at headquarters? Is she prohibited from entering a state park? Or is she merely prohibited from entering the headquarters building? If she goes camping at a state park and says “hello” to a ranger, has she violated this condition? The sentencing hearing contained no discussion of the no-contact provision that was ordered in paragraph 4.3.

(See Report of Proceedings from September 19, 2008). Depending on who this prohibition is meant to cover, Ms. Dennis does not necessarily object to this condition. If this prohibition is meant to prevent her from having dinner with an old friend from her ranger days or a co-worker at headquarters who had no involvement in this case, she needs to know that. It is highly unusual that this condition was placed in the judgment and sentence without an oral pronouncement from the Court.

In *State v. Bahl*, 164 Wn.2d 739, 193 P.d 678 (2008), the Washington Supreme Court held that a pre-enforcement challenge to a sentencing condition is not per se un-ripe for review. The Court articulated four requirements for pre-enforcement review: (1) the issue(s) raised must be primarily legal; (2) the issue does not require further factual development; (3) the challenged action is final; and (4) a consideration of hardship to the parties if the Court does not review the condition imposed. *Bahl* at 751. In *State v. Sanchez Valencia*, 148 Wn.App. 302, 320 (2009) and *State v. Brewer*, No. 36470-1-II (2-10-09), Division II has added a fifth requirement: That the vagueness challenge must involve a first amendment right in order to be considered ripe. The *Sanchez Valencia* Court wrote that where a vagueness challenge does not involve a first amendment right it must be evaluated in light of its particular facts. Thus, the Court reasoned, it fails the first part of the *Bahl* test, namely that the

challenge involve an issue that is primarily legal, and the second part of the *Bahl* test, namely that further factual development is not needed . *Sanchez Valencia* at 320. Therefore, where the challenge does not involve a first amendment right, the appellant must prove actual harm before his challenge may be considered ripe. Id. The *Sanchez Valencia* Court uses the term “purely legal,” whereas the *Bahl* Court used the term “primarily legal.” Id. As the dissent noted in *Sanchez Valencia*, the majority’s holding “merely repeats *Motter*’s requirement to show harm before review will be granted, essentially transforming the need for further factual development under *Bahl* to ripeness dependent on harm shown. *Sanchez Valencia* at 327, citing *State v. Motter*, 139 Wn.App. 779, 803-04, 162 P.3d 1190 (2007). (Internal citation omitted).

Ms. Dennis respectfully submits that the holding in *Sanchez Valencia* is incorrect and suggests the Court lacks the authority to add additional parts to the test prescribed in *Bahl*. Under the holding in *Bahl*, the sentencing condition at issue here is ripe for review because it is primarily legal (Ms. Dennis is not challenging the Court’s authority to impose the no-contact condition, she simply can’t figure out whom she is prohibited from contacting), further factual development is not needed (again, Ms. Dennis simply needs a clearer order, and does not seek re-litigation of the issue), the judgment and sentence is a final action and,

last, Ms. Dennis is suffering considerable hardship where she has to cancel camping trips and ignore friendly phone calls because she can't figure out the proscriptions of this order. Indeed, she has sought advice from appellate counsel who is at an equal loss to figure out who this no-contact order applies to.

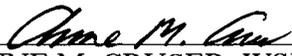
Even applying the *Sanchez Valencia* test, Ms. Dennis respectfully submits she is entitled to have her case remanded for clarification because no-contact orders implicate freedom of speech and the right to peaceably assemble, both protected by the first amendment.² Ms. Dennis respectfully asks this Court to remand her case for clarification of the judgment and sentence, at paragraph 4.3, to make more definite the party or parties with whom she is prohibited from having contact, and the area or areas she is prohibited from entering.

E. CONCLUSION

Ms. Dennis asks this Court to reverse her conviction and remand her case for a new trial. Ms. Dennis also asks this Court to remand her case for clarification of the no-contact condition of sentence contained within her judgment and sentence.

² The First Amendment to the United States Constitution provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

RESPECTFULLY SUBMITTED this 9th day of April, 2009.



ANNE M. CRUSER, WSBA#27944
Attorney for Ms. Dennis

APPENDIX

1. RCW 9A.56.020 (1) "Theft" means:

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

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

STATE OF WASHINGTON,)
) Court of Appeals No. 38428-1-II
) Thurston County No. 08-1-00564-3
 Respondent,)
)
 vs.) AFFIDAVIT OF MAILING
)
 HEATHER DENNIS,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 9th day of April 2009, affiant placed a properly stamped envelope into the mails of the United States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Ms. Heather Dennis
219 Tilley Ave.

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com