

NO. 43091-6-II

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

STATE OF WASHINGTON, Respondent

v.

VASILY SLOBODYANYUK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00690-5

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. This Court should find sufficient evidence supported Slobodyanyuk's conviction for Count Two: Assault in the Third Degree.
- II. This Court should find sufficient evidence supported Slobodyanyuk's conviction for Counts Four – Six: Identity Theft in the Second Degree.
- III. This Court should find sufficient evidence supported Slobodyanyuk's conviction for Count One: Theft in the Third Degree.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, “the defendant”) was charged by Amended Information with Count One: Theft in the Second Degree, Count Two: Assault in the Third Degree, Count Three: Possession of Stolen Property in the Second Degree, and Counts Four – Six: Identity Theft in the Second Degree. (CP 1-2). Trial commenced on January 30, 2012. (RP 115).

Based on the evidence that was presented at trial, the State asked the court to instruct the jury on the lesser included offense of Theft in the Third Degree for Count One, instead of Theft in the Second Degree. (RP 366; CP 53). The court also instructed the jury on the lesser included

offense of Assault in the Fourth Degree for Count Two, in addition to Assault in the Third Degree.¹ (CP 61-63).

The jury found the defendant guilty of Theft in the Third Degree (Count One), Assault in the Third Degree (Count Two), Possession of Stolen Property in the Second Degree (Count Three), and three counts of Identity Theft in the Second Degree (Counts Four – Six). (RP 438-441).

The defendant was sentenced on February 3, 2012. (RP 447). The defendant advised the court that he was sorry and he “repent[ed]” that people suffered that much. (RP 458). The court sentenced the defendant to 364 days on Count One (concurrent with Counts Two - Six). (RP 460). With an offender score of 4 points, the trial court sentenced the defendant to 16 months confinement on Counts Two - Six. (RP 460; CP 6). This timely appeal followed. (CP 15).

II. Summary of Facts

Brandon Kilian is employed as a security guard for Nighthawk Protection. (RP 130). As a security guard, Kilian’s duties include patrolling businesses and apartment complexes, looking for suspicious activities, and responding to noise complaints. (RP 130). While on duty, Kilian drives a Ford Crown Victoria. (RP 131). The vehicle displays the

¹ The jury was also instructed on, and rejected, the affirmative defense of self-defense. (CP 64).

company's logo and says "Rapid Response" on the back with the company's phone number. (RP 131). Kilian wears black uniform pants with stripes down the side and a tan uniform shirt, which displays a badge and patches that say "Nighthawk Protection." (RP 132).

On April 24, 2011, Kilian was on-duty, working for Nighthawk Security. (RP 132). Kilian's shift was from 7:30 p.m. until 6:00 a.m. (RP 133). The apartments patrolled by Kilian that night included the Madison Park Apartment complex in Clark County, Washington. (RP 134). The entrance and exit to the Madison Park Apartment complex is normally secured by a gate, which requires a pass code for entry; however, during this week the gate was broken and it was stuck in the open position. (RP 135). Consequently, management asked Nighthawk Security to conduct extra patrols of the apartment complex. (RP 135).

Kilian conducted six patrols of the Madison Park Apartment complex on the night of April 24, 2011. (RP 136). Approximately two hours lapsed between each patrol. (RP 138). Kilian conducted his sixth and final patrol of the property at approximately 3:30 a.m. At that time, Kilian observed a black car in the apartment complex parking lot that was double-parked behind several other cars. (RP 137). This vehicle was not present during Kilian's previous patrols of the parking lot that night. (RP 137). The black car was located at the back of the parking lot, which was

approximately one-quarter mile from the front gate. (RP 139). The car was approximately 40 yards from the apartment buildings. (RP 137). The portion of the parking lot in which the vehicle was located was “extremely dark” because the light on the adjacent light pole was burned out. (RP 136-37).

As he drove past the black vehicle, Kilian heard a noise that sounded like a car trunk closing. (RP 137-38). Kilian exited his patrol vehicle, he approached the black vehicle, and he saw a man (later identified as the defendant) standing next to the black car. (RP 137-38). Kilian asked the defendant for his name. (RP 138-39). The defendant said his name was “William Brown.” (RP 139). Kilian saw no one else with the defendant and he saw no one in the distance. (RP 139). Kilian asked the defendant what he was doing at the apartment complex. (RP 139). The defendant said he was waiting for a friend. (RP 139). Kilian asked the defendant what was his friend’s name. (RP 140). The defendant said he did not know. (RP 140). Kilian asked the defendant where his friend lived. (RP 140). The defendant said “I don’t know.” (RP 140).

While Kilian was talking to the defendant, he was able to see through the window of the defendant’s vehicle into the passenger compartment. (RP 140). Inside the defendant’s vehicle, Kilian observed a

number of items, including multiple stereo faceplates, a laptop case, and miscellaneous electronics. (RP 140). Kilian asked the defendant if he wouldn't mind opening his trunk. (RP 141). The defendant responded "no problem." (RP 141). Inside the defendant's trunk, Kilian observed a toolbox and latex gloves sitting on top of the tool box. (RP 141). Based on the totality of circumstances, Kilian believed he had interrupted the defendant from committing vehicle prowls. (RP 141).

Kilian asked the defendant to walk with him to his patrol car. (RP 141). While en route to his patrol car, Kilian contacted his dispatcher with his handheld radio. (RP 141). Kilian's radio was Kenwood brand and it was issued to him by Nighthawk Security. (RP 142). The radio had an antenna on top, several different buttons, volume on one side and different channels at the top. (RP 141-42). Once Kilian and the defendant reached Kilian's patrol car, dispatch advised Kilian, via his radio, that the Vancouver police would be arriving in approximately ten minutes. (RP 143). After dispatch provided this information, the defendant became agitated and advised Kilian "I'm just going to go." (RP 143-44). Kilian told the defendant that they just needed to "hang out" for a couple more minutes so that the police could ask him some questions. (RP 144). Kilian had placed his hand on top of the defendant's right hand, which was on his patrol car. (RP 145). Kilian contacted dispatch again to see if the

police could come a little faster, because the defendant wanted to leave. (RP 145). The moment Kilian completed the transmission, the defendant turned towards him and swung at Kilian's face with his left hand. (RP 146). Kilian tried to duck. (RP 167). The defendant's left fist grazed Kilian's left eyebrow. (RP 146).

The defendant took off running. (RP 147). Kilian located the defendant again at the defendant's vehicle. (RP 148). Kilian leaned into the defendant's vehicle, in an effort to get the defendant out of his vehicle. (RP 148). Kilian lost his grip of the defendant and the defendant drove away. (RP 148). Kilian reached for his radio and discovered it was gone. (RP 149). Kilian had previously provided the make, model, and license plate number of the defendant's vehicle to dispatch. (RP 150).

At approximately 3:45 a.m., Vancouver Police Department ("VPD") Officer Todd Schwartz located a vehicle on the road, in the vicinity of the Madison Park apartment complex, which matched the description of the defendant's vehicle. (RP 182). The vehicle eventually pulled into a residential driveway (which did not belong to the defendant). (RP 184, 187). Officer Schwartz could hear police radio traffic emanating from the vehicle as he approached it. (RP 188). Officer's Schwartz's view of the driver was obstructed by all of the items in the passenger compartment. (RP 186). After the driver exited the vehicle, Officer

Schwartz observed what appeared to be a portable police radio sitting on the driver's seat. (RP 189). The radio was turned on. (RP 189). Kilian was called to the scene and identified the driver as the person who assaulted him (the defendant). (RP 152). Kilian also identified the portable radio as his radio, which he had been missing since the defendant fled the Madison Park apartment complex. (RP 153).

VPD Sergeant John Schultz arrived at the scene to assist Officer Schwartz. (RP 202). Through the window of the defendant's vehicle, Sergeant Schultz observed a police radio in the driver's seat, a Mac laptop between the driver's seat and passenger seat, a large flat-screen television in the backseat, a piece of luggage in the backseat and a piece of luggage in the front seat. (RP 202). Sergeant Schwartz could read the names on the luggage tags, which were "Jim Lowne" and "Jolene Conzatti." (RP 203). Sergeant Schwartz later learned that Jim Lowne's and Jolene Conzatti's residence had been burglarized while they were out of town that weekend (April 23 – April 24, 2011). (RP 205; 237-38).

VPD Officer Spencer Harris obtained a search warrant for the defendant's vehicle. (RP 233). In the passenger compartment of the defendant's vehicle, Officer Harris observed items including a Samsung Blu Ray disc player, a stereo, speakers, a 47 inch LG flat-screen television, and a laptop computer. (RP 236, 241-42). All items were

determined to have been stolen from the residence of Jim Lowne and Jolene Conzatti during the burglary. (RP 242, 301-03). The suitcase belonging to Lowne contained Lowne's antique fishing equipment. (RP 240). A small box inside the defendant's vehicle contained Lowne's ring. (RP 247). The flat-screen TV was estimated to have a value of \$1200.00, the Blu Ray disc player was valued at \$250.00, the stereo was valued at \$180.00 - \$200.00, the computer was valued at \$1200.00, the vintage fishing equipment was valued at \$900.00, and the ring was valued at \$24,000.00. (RP 307-08).

In the trunk of the defendant's vehicle, Officer Harris observed identification cards, credit cards, checkbooks, and other various personal documents belonging to three people: Asaya Carducci, Nicola Carducci, and Victoria Overholser. (RP 244). Officer Harris did not discover any accompanying purses or wallets inside the trunk or inside the passenger compartment of the vehicle. (RP 246-47).

It was later discovered that Asaya and Nicola Carducci's residence and Victoria Overholser's residence had been burglarized between April 17 and April 18, 2011. (RP 252). Asaya Carducci advised that the last time she saw her identification card, bank cards, and checkbook they were contained inside her purse, which was taken during the burglary. (RP 266-67). Nicola Carducci advised that the last time he saw his ID card and

bank card, they were contained inside his wallet, which was taken during the burglary. (RP 278). Victoria Overholser advised that the last time she saw her ID card and her bank cards, they were contained in her purse, which was taken during the burglary. (RP 288). Overholser said her bank card was used at a gas station soon after it was stolen from her. (RP 292).

The defendant spoke to Officer Harris after he was detained. (RP 344-45). The defendant told Officer Harris that he lived in Portland, Oregon. (RP 344-45). He said he was at a party on “Plomondon” street on the night of April 23, 2011. (RP 347). The defendant told Officer Harris that he went to the Madison Park apartment complex during the early morning hours of April 24, 2011 because he was dropping off some friends who were drunk. (RP 350). The defendant was asked to identify his friends but he refused to do so. (RP 345).

When the defendant testified at trial, he said he lived in Vancouver, Washington when the alleged crimes were committed. (RP 345). The defendant testified that he was at home, asleep, on the night of April 23, 2011. (RP 335). The defendant testified that he went to the Madison Park apartment complex during the early morning hours of April 24, 2011, because he received a phone call from an “acquaintance” who said he needed the defendant to “carry something in [his] car.” (RP 335). The defendant said, once he arrived at the apartment complex, he met two

men, who loaded items into his car. (RP 335-36). The defendant identified one of the men as having the nickname “Max” or “David” or “Danick.” (RP 351). He identified the second man as having the nickname “small guy” or “Mali,” who was also called “Tim.” (RP 352). The defendant admitted that the statements he made to Officer Harris on the morning of April 24, 2011 were false. (RP 345).

C. ARGUMENT

I. The evidence was sufficient to convict the defendant of Count Two: Assault in the Third Degree.

The defendant does not dispute the fact that he assaulted Brandon Kilian with the intent of resisting Kilian’s apprehension or detention of him. *See* Brief of Appellant (“Brief”) at p. 4. However, the defendant claims the evidence was insufficient to convict him of Assault in the Third Degree because Kilian’s apprehension or detention was not lawful when Kilian did not have probable cause to believe the defendant was committing a crime. *See* Brief, at p. 8. For the reasons set forth below, the defendant’s argument is without merit.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. In order to determine whether the necessary quantum of proof exists, the reviewing court need only be satisfied that substantial evidence supports the State’s case. *State v. Galista*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 875-75, 83 P.3d 970 (2004).

Under RCW 9A.36.031(1)(a), a person commits Assault in the Third Degree

(1) if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist...the lawful apprehension or detention of himself..., assaults another.

The protection of the Assault in the Third Degree statute extends to private citizens who are lawfully arresting or detaining another person. *State v. Mierz*, 127 Wn.2d 460, 478, 901 P.2d 286 (1995). A private citizen can make a citizen’s arrest “when a felony or a misdemeanor that constitutes a breach of the peace is committed in that individual’s presence.” *State v. Malone*, 106 Wn.2d 607, 609, 724 P.2d 364 (1986).

To constitute a “breach of the peace” it is not necessary that the peace be actually broken and, if what is done is unjustifiable and

unlawful, tending with sufficient directness to break the peace, no more is required, nor is actual personal violence and essential element of the offense.

Stone Mach. Co. v. Kessler, 1 Wn. App. 750, 754, 463 P.2d 651 (1970). A “breach of the peace” is required only in order for a citizen to arrest on a misdemeanor; a breach of the peace is not required in order for a citizen to arrest on a felony. *State v. Gonzales*, 24 Wn. App. 437, 439, 604 P.2d 168 (1979) (private person may arrest for a misdemeanor only if it constitutes a breach of the peace); *State v. Jack* 63 Wn.2d 632, 637, 388 P.2d 566 (1964) (citizen may arrest for felony based on reasonable and probable cause to believe a felony occurred).

Probable cause “has often been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. ...” *State v. Jack*, 63 Wn.2d 632, 637, 388 P.2d 566 (1964) (quoting *State v. Hughlett*, 124 Wash. 366, 370, 214 Pac. 841 (1923)). Probable cause is based on the totality of the circumstances. *See State v. Smith*, 130 Wn.2d 215, 224, 922 P.2d 811 (1996). For example, “the improbability of the presence of vehicles in the area of the general description at that time of the night can be an important factor in providing probable cause for the arrest.” *State v. Young*, 39 Wn.2d 910; 239 P.2d 858 (1952). Whether probable cause exists is an objective inquiry - it is not based on the

subjective beliefs of the arresting party. *State v. Louthan*, 158 Wn.App. 732, 743, 242 P.3d 954 (2010), citing *State v. Stebbins*, 47 Wn. App. 482, 735 P.2d 1353 (where police arrested suspect for armed robbery, for which there was no probable cause, arrest held lawful because probable cause existed to arrest for crime of burglary), *review denied*, 108 Wn.2d 1026 (1987).

Here, Brandon Kilian had probable cause to believe he had interrupted the defendant from committing the crime of Vehicle Prowl in the Second Degree. A person commits Vehicle Prowl in the Second Degree when he or she enters or remains unlawfully in a vehicle with intent to commit a crime against a person or property therein. RCW 9A.52.100. Kilian discovered the defendant standing outside his vehicle, which was double-parked behind two other cars, in an unlit portion of the Madison Park apartment complex parking lot, in the middle of the night, during a time when the security gate to the apartment complex was broken. The passenger compartment of the defendant's vehicle was visibly littered with valuable electronics and the defendant had just slammed-shut his trunk, which contained tools, surgical gloves, and financial information belonging to three different people. When the defendant agreed to talk to Kilian, he could provide no plausible explanation for why he was in the apartment complex parking lot at that

time. Based on the totality of these facts and circumstances, it was reasonable for Kilian to believe the items inside the passenger compartment of the defendants' vehicle were stolen and it was reasonable for Kilian to believe the defendant procured these items by breaking into cars in the Madison Park apartment complex parking lot. This criminal conduct constituted a breach of the peace because it is axiomatic that a person breaches the peace when he or she enters an apartment complex, in the middle of the night, where he is not a resident, and prowls the vehicles of those who are residents, in order to steal their property.

In the alternative, even if Kilian lacked probable cause to believe the defendant was prowling vehicles, probable cause still existed to believe the items inside the passenger compartment of the defendant's vehicle were stolen and that the value of these items exceeded \$750.00. Consequently, probable cause existed to believe the defendant was committing the crime of Possession of Stolen Property in the Second Degree. Under RCW 9A.56.160(1)(a), a person possesses stolen property in the second degree when he or she possesses stolen property which exceeds \$750.00 in value. "Possessing stolen property" means to "knowingly [...] receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled

thereto.” RCW 9A.56.140(1). Possessing stolen property is a continuing offense. *State v. Contreras*, 162 Wn. App. 540, 545, 254 P.3d 214 (2011) (stating a person continues to commit the crime of possessing stolen property so long as he possesses or retains the stolen items).

Here, the passenger compartment of the defendant’s vehicle was filled with valuable electronics, including a 47 inch LG flat-screen television, a laptop computer, a stereo and stereo faceplates. The value of the flat-screen television, in and of itself, was \$1200.00. The defendant possessed stolen property in Kilian’s presence because he was in possession of and retaining the stolen items when Kilian encountered him. Further, it was unnecessary for the offense to constitute a “breach of the peace” because Possession of Stolen Property in the Second Degree is a felony offense. RCW 9A.56.160(2).

Because Kilian had probable cause to believe the defendant was committing Vehicle Prowl in the Second Degree or Possession of Stolen Property in the Second Degree, Kilian’s apprehension or detention of the defendant was lawful. Consequently, the evidence was sufficient to convict the defendant of Assault in the Third Degree when the defendant assaulted Kilian with the intent of resisting Kilian’s lawful apprehension or detention.

The defendant's conviction for Count Two should be affirmed; however, assuming, arguendo, this Court finds the evidence was insufficient to convict the defendant of Assault in the Third Degree, then the proper remedy is to remand this case to the trial court to enter judgment and sentence on Count Two for Assault in the Fourth Degree. *State v. Garcia*, 146 Wn. App. 821, 830, 193 P.3d 181 (2008), citing *State v. Gilbert*, 68 Wn. App. 379, 384-87, 842 P.2d 1029 (1993) (stating, when the appellate court finds insufficient evidence to support the charged offense, the proper remedy is to direct the trial court to enter judgment on the lesser degree of the crime charged, when the lesser degree was necessarily proven at trial). Here, Assault in the Fourth Degree is a lesser degree of Assault in the Third Degree. RCW 9A.36.041(1). Also, the jury was instructed on Assault in the Fourth Degree as a lesser offense. (CP 61). In addition, Assault in the Fourth Degree was necessarily proven at trial because the jury had to find the defendant assaulted Brandon Kilian in order to convict him of Assault in the Third Degree. RCW 9A.36.031(1)(b); (CP 57; Instr. No. 12).

II. The evidence was sufficient to convict the defendant of Counts Four – Six: Identity Theft in the Second Degree.

The defendant does not dispute that his trunk contained identification cards, credit cards, and check books belonging to three

different people. *See* Brief, at p.5. However, the defendant argues the evidence was insufficient to convict him of Identity Theft in the Second Degree because the State failed to prove the defendant knowingly possessed these items or that he intended to use them. *See* Brief, at p. 12. This argument is without merit.

A person commits Identity Theft in the Second Degree when he or she “knowingly obtain[s], possess[es], use[s], or transfer[s] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1).

Here, the defendant was in possession of identification cards and financial information (including credit cards and checkbooks) belonging to three different people: Asaya Carducci, Nicola Carducci, and Victoria Overholser. Asaya Carducci, Nicola Carducci, and Victoria Overholser each testified that, when their identification cards and financial information were stolen, these items were contained in either their wallets or in their purses. However, when Officer Harris discovered the victims’ identification cards and financial information, these items were lying, loosely, in the defendant’s trunk.² Officer Harris testified that he did not

² There is no evidence that Officer Harris had to sift through a “jumble” of other items in order to discover these items. Rather, the victims’ identification cards, credit cards, and checkbooks were readily visible to Officer Harris when he opened the defendant’s trunk.

discover any wallets or purses inside the defendant's vehicle. Given these facts, it is evident that, at some point, the defendant sifted through the victims' wallets and purses and extracted these items. Consequently, the defendant knowingly possessed these items. In addition, it is evident that, at some point, the defendant discarded the victims' wallets and purses, while retaining their identification cards and financial information. There is only one plausible reason as to why the defendant would choose to discard the victims' wallets and purses but to retain their ID cards and financial information: because the defendant intended to use the victims' ID cards and financial information to aid, abet, or commit a crime.

This fact pattern is distinguishable from a case where a defendant is found in possession of a wallet that happens to contain the victim's ID card and/or financial information. In that case, it is questionable whether the defendant knows of the wallet's contents, let alone whether he intends to use the wallet's contents. However, under the facts of this case, there can be no mistake that the defendant sought-out specific items within the victims' wallets and purses and that he retained these items, while discarding other items, in order to use them. Consequently, the evidence was sufficient to convict the defendant of each count of Identity Theft in

the Second Degree. The defendant's convictions for Counts Four – Six should be affirmed.

III. The evidence was sufficient to convict the defendant of Count One: Theft in the Third Degree.

The defendant claims the evidence was insufficient to convict him of Theft in the Third Degree because there is no evidence that he intended to steal Brandon Kilian's radio. *See* Brief, at p. 12. This argument is also without merit.

A person commits theft when he or she “wrongfully obtain[s] *or* exert[s] *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.” RCW 9A.56.020(1)(a) (emphasis added). A person commits Theft in the Third Degree when he or she commits theft of property or services which “does not exceed seven hundred fifty dollars in value.” RCW 9A.56.050(1).

In the instant case, the defendant fled from the Madison Park apartment complex with Brandon Kilian's security radio inside his vehicle, immediately after he assaulted Kilian. It is reasonable to conclude the defendant knew Kilian's radio was inside his vehicle because the radio was perched next to him on the driver's seat and because it was turned on to a loud volume. There is no evidence that the defendant

intended to return the radio to Kilian. Further, it is reasonable to conclude the defendant had no intent to return Kilian's radio to him because he derived a benefit from his possession of it (to wit: the defendant had just fled the scene of a crime and he could now listen to police radio traffic that likely involved the police department's search for him). In addition, while the defendant was in possession of Kilian's radio, Kilian was deprived of the ability to use the radio to advise dispatch that he had just been assaulted or to advise dispatch that the defendant had just fled the scene.

Here, even if the defendant did not "wrongfully obtain" Kilian's radio, he "exerted unauthorized control" over it when he knowingly kept the radio in his vehicle, thereby depriving Kilian of the ability to use it, and when he made no effort to return the radio to Kilian. Consequently, the evidence was sufficient to convict the defendant of Theft in the Third Degree. The defendant's conviction for Count One should be affirmed.

D. CONCLUSION

The evidence was sufficient to convict the defendant of all counts. Therefore, the defendant's convictions for Counts One, Two, Four, Five, and Six should be affirmed.³ In the alternative, if the Court finds the evidence was insufficient to convict the defendant of Count Two (Assault in the Third Degree), then the limited remedy to which the defendant is entitled is remand to the trial court for entry of judgment and sentence on the lesser offense of Assault in the Fourth Degree.

DATED this _____ day of _____, 2012.

Respectfully submitted:

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³ The defendant does not challenge the sufficiency of the evidence to convict him of Count Three: Possession of Stolen Property in the Second Degree.

CLARK COUNTY PROSECUTOR

October 24, 2012 - 2:44 PM

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