FILED
DECEMBER 5, 2012
Court of Appeals
Division III
State of Washington

COA No. 30232-6-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT LEE WIDRIG, Appellant.

AMENDED

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF THE CASE 4

ANSWER TO FIRST ASSIGNMENT OF ERROR 10
The State of Washington presented sufficient evidence to allow the jury to find Robert Lee Widrig committed residential burglary, second degree theft, and second degree animal cruelty.

ANSWER TO SECOND ASSIGNMENT OF ERROR 10
The trial court did not abuse its discretion in denying appellant's motion for mistrial based on extraneous evidence because the court had ample evidence based on individual juror questioning to find, beyond a reasonable doubt, that the extraneous evidence was not used nor did it effect jury deliberation and verdict.

ARGUMENT 11-16

ARGUMENT - FIRST ASSIGNMENT OF ERROR 11-13

ARGUMENT - SECOND ASSIGNMENT OF ERROR 14-16

CONCLUSION 17

TABLE OF AUTHORITY

State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980) 11

State v. Drum, 168 Wash.2d 23, 34-35, 225 P.3d 237 (2010).....11

State v. Fry, 153 Wash.App. 235, 220 P.3d 1245 (2009) 14

State v. Johnson, 124 Wash.2d 57, 76, 873 P.2d 514 (1994) 10

State v. Quismundo, 164 Wash.2d 499, 504, 192 P.3d 342 (2008).....14

State v. Thomas, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004).....11

STATEMENT OF THE CASE

On June 22, 2009, the State of Washington formally charged Robert Lee Widrig (hereafter appellant), by information, with one count residential burglary, one count second degree theft, and twelve counts second degree animal cruelty. (Clerk's Papers 78-81). The theft and burglary charges were, in brief, for allegations related to appellant breaking into his ex-wife's, Katrina Riexinger, residence following their divorce, and stealing jewelry, a laptop, and a lantern. (Report of Proceedings 74). The animal cruelty charges were related to allegations that appellant placed the family's prize Netherland pedigree show rabbits in the autumn cold, causing suffering. (RP 76).

The issue at jury trial was not whether the burglary, theft, and animal cruelty acts actually occurred. Appellant only argued he did not commit the crimes because, at the time the crimes occurred, appellant claimed he was in his mother's house, with his girlfriend, in North Bend, Washington. (RP 356).

The State called eight witnesses in the following order: Katrina Riexinger, appellant's ex-wife (RP 49); River Widrig, appellant's son (RP 120); Kevin Opdahl, pawn shop employee (RP 126); Joyce Julsrud, Kittitas County Superior Court Clerk (RP 133); Tamara Roland,

appellant's girlfriend (RP 137); Ivalee Widrig, appellant's mother (RP 168); Marilyn Riexinger, mother of Katrina Riexinger (RP 195); and Officer Jennifer Rogers, Cle Elum Police Department Officer (RP 218). Appellant called witneses in the following order: June Holt, office manager for appellant's employer (RP 278) and Bette Jean Moe, appellant's sister (RP 289).

Katrina Riexinger (hereafter Ms. Riexinger) testified she was married to appellant for thirty years before divorcing him in 2008. (RP 50). The divorce, in Ms. Riexinger's words, was "because [appellant] abandoned us [the family]," noting that appellant had gambling and substance abuse problems. (RP 52-55). Ms. Riexinger was awarded the family house in the divorce proceedings based on approximately $50,000 in past-due child support owed by appellant. (RP 56). The divorce decree allowed appellant until October 15, 2008, to pick up his awarded property from the house. (RP 66). Cle Elum Police Department was originally scheduled in late-September on a Sunday morning to have an officer present while appellant retrieved his items. (RP 67). Appellant cancelled the appointment and did not pick up his items, nor did he schedule another pickup appointment. Id. Ms. Riexinger left Washington with the children for an October 5 to October 13, 2008 vacation. Id. Marilyn Riexinger, Ms. Riexinger's mother, watched the house while they were gone. (RP 68).

On October 10, 2008, Ms. Riexinger received a call from her mother about a theft and missing rabbits that occurred between the evening of October 9 or morning of October 10, 2008. (RP 69-70). Upon returning home a few days later, Ms. Riexinger found a lantern, laptop, and jewelry were missing from the house, with a total value of approximately $14,000. (RP 73). All other electronics, jewelry, and personal items were not removed from the house. (RP 74-75).

Around October 2008, appellant and appellant's girlfriend Tamara Rowland, both out of work, "were having kind of a hard time with . . . every day living," referring to money. (RP 155). Additionally, appellant was "sad" and "felt bad" that he could not give his children money, feeling "desperate." (RP 156-157.) Ivalee Widrig (hereafter Mrs. Widrig), appellant's mother, testified appellant gave her Ms. Riexinger's wedding ring and engagement ring for safekeeping. (RP 184.) Appellant never gave Mrs. Widrig other items for safekeeping. (RP 194). She placed the rings in her headboard, but later gave them back to appellant to pawn. (RP 185). On November 24, 2008, Tamara Rowland pawned the jewelry stolen from Ms. Riexinger's home. (RP 129-130). She pawned them upon the direction of appellant because appellant did not have identification to pawn the jewelry himself. (RP 146). The pawned jewelry were all pieces given to Ms. Riexinger by appellant. (RP 92-106).

On October 10, 2008, Officer Jennifer Rogers was dispatched to investigate the burglary at the Riexinger house. (RP 228). Approximately two hours after her initial burglary investigation, Officer Rogers learned appellant called dispatch to request civil standby to pick up the remainder of his items from Riexinger's house. (RP 229). Officer Rogers called appellant; after Officer Rogers mentioned the burglary to appellant, he became "nervous," . . . "starting to stutter." (RP 231). Appellant told Officer Rogers he was in North Bend, not Cle Elum, during the burglary timeframe, although she never specifically mentioned what the timeframe was. (RP 232, 234). Appellant also denied any knowledge of rabbits at the house, saying "I didn't know she had rabbits?" (RP 233). Finally, Officer Rogers heard appellant ask his mother, in the background, "you can verify I was here last night and today, right?" (RP 235).

Ivalee Widrig, appellant's mother, told Officer Jennifer Rogers via phone that appellant was home with her during the burglary timeframe, and that he went to bed around 11pm to midnight, but she did not mention anything about the following morning. (RP 241, 243). Mrs. Widrig testified appellant lived in a fifth wheel next to her main house. (RP 177). Mrs. Widrig generally went to bed around 7pm and slept until 8am the next morning. (RP 175). Finally, June Holt, office manager for appellant's employer, testified appellant worked in North Bend from 6:30am to

1:30pm on the day of the burglary. (RP 282). No testimony was given regarding anyone seeing appellant in North Bend on October 10, 2008 between midnight and 6:30 am.

The family's show rabbits were imported from the Netherlands and sold to people in Tokyo, Japan. (RP 76). River Widrig principally took care of the rabbits, along with the other children. Id. The family had twelve rabbits in October of 2008. A locked shed with heat lamps, located about 60 feet from the house, contained the rabbits, with power coming from an underground cord connected to the main house where the cord connected underneath the deck. (RP 78-80). Appellant built the shed, installed the power outlets under the deck, and dug the trench for the underground cord. (RP 111-112.) An outsider, looking from the shed in search of the power source, could not determine where or how the shed received power. (RP 254).

Nine of the twelve rabbits were found on October 13, 2008; the rabbits appeared to be "stressed," (RP 81), "scared, skinny, and starved," (RP 123), after their removal from the shed into the cold weather. Two later died. (RP 82). Three rabbits were never found. Id.

The jury deliberated and found appellant guilty of all charges on May 11, 2011. (CP 151-164). On May 12, 2011, Kittitas County Superior Court Judge Scott Sparks wrote a letter to the State of Washington and

counsel of appellant advising he noticed the Washington Court Rules, Volume I – State, was found in the jury room after verdict. Appellant filed a motion for mistrial on June 24, 2011. (CP 166).

On June 17 and 24, 2011, the court and counsel questioned each juror, under oath, about the use of the Court Rules book and whether its use affected any juror in deliberation or final verdict. (RP 378, 423). Only one juror, #11, testified that he touched the book during deliberations, where he merely "thumbed through" the book with no said impact on deliberations. (RP 393-396). All other jurors either testified the book had no effect on deliberation or verdict, or the jurors did not know of the book's existence. (RP 378-447). After oral argument from both counsel, the trial court found no mistrial occurred. (CP 180-182; RP 447). This appeal followed.

ANSWER TO FIRST ASSIGNMENT OF ERROR

The State of Washington presented sufficient evidence to allow the jury to find Robert Lee Widrig committed residential burglary, second degree theft, and second degree animal cruelty.

A. Preservation

Appellant's first assignment of error was properly preserved.

ANSWER TO SECOND ASSIGNMENT OF ERROR

The trial court did not abuse its discretion in denying appellant's motion for mistrial based on extraneous evidence because the court had ample evidence based on individual juror questioning to find, beyond a reasonable doubt, that the extraneous evidence was not used nor did it effect jury deliberation and verdict.

A. Preservation

Appellant's second assignment of error was properly preserved.

B. Standard of Review

This court reviews a trial court's denial of a motion for mistrial for an abuse of discretion. State v. Johnson, 124 Wash.2d 57, 76, 873 P.2d 514 (1994).

ARGUMENT

A. The State presented sufficient evidence to allow a jury to find the identity of the appellant.

Evidence is sufficient if a "rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." State v. Drum, 168 Wash.2d 23, 34-35, 225 P.3d 237 (2010) (*quoting* State v. Wentz, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)). An appellant, when challenging sufficiency of evidence, admits the truth of the State's evidence and all reasonable inferences therein. Id. at 35. A distinction between direct and circumstantial evidence is not made; circumstantial evidence is considered "equally reliable" in determining sufficiency. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The court gives fact finder deference to any issue of witness credibility, persuasiveness of evidence, or conflicting testimony. State v. Thomas, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004).

Here, appellant only argues the jury lacked sufficient evidence to identify appellant as the person who committed the alleged crimes; all other non-identity elements are not contested. (App. 11).

Regarding the charges of residential burglary and second degree theft specifically, the jury was presented with sufficient identification evidence when the evidence is examined in the light most favorable to the

state. Appellant was within one hour of the burglary location on the alleged crime date. (RP 153). Appellant called emergency dispatch to request civil standby shortly after police learned of the burglary to ask permission to retrieve belongings. (RP 229). Notably, the stolen jewelry were items appellant personally knew the location of based on his connection with the house; the jewelry items were of the only items he gave his wife during their marriage. (RP 243). No other items of value, other than a laptop, were taken from the house during the burglary. Id. Appellant gave his mother the jewelry for safekeeping. (RP 184.) Appellant never gave his mother other items for safekeeping. (RP 194). Appellant was present when the stolen jewelry was later pawned, and appellant's girlfriend signed the pawn slip on appellant's request. (RP 246).

Regarding the second degree animal cruelty charges, the jury was also presented with additional sufficient identification evidence, in addition to the above-discussed evidence. The evidence showed these rabbits were special show rabbits, requiring constant heat and light source. (RP 78). Appellant built the rabbit shed with heat lamps plugged into a hidden outdoor wall plug; appellant was one of the only people who knew how this shed operated or where the concealed plug was located. Id. During investigation, Officer Rogers could not determine how the shed

received power. (RP 254). When Officer Rogers spoke with appellant, knowing appellant had knowledge of the rabbits, appellant denied any knowledge of rabbits at the house, obviously an untruthful statement given his involvement with the rabbits since 1998. (RP 233).

Appellant and appellant's mother told Officer Rogers that appellant was in North Bend, not Cle Elum, on the dates in question. (RP 232). Appellant produced employment records that show he worked from 6:30am to 1:30pm on October 10, 2008. (RP 282). Even with appellant's mother's testimony and appellant's employer's testimony, however, appellant remains unaccounted for between the hours of 12am and 6:30am on the date in question. (RP 282). Given his close proximity to the burglary location and the unaccounted timeframe, a reasonable fact finder could determine appellant acted within the early morning hours without detection from family.

Finally, in connecting appellant to the criminal acts, the jury was presented with evidence of appellant's. Motive can be found in appellant's divorce proceedings, gambling problems, and appellant's child support debt. Appellant and his girlfriend were having money problems, making appellant "sad." Given the above, a fact finder can make reasonable inferences leading to a conclusion of positive identity.

B. The trial court correctly denied appellant's motion for mistrial regarding the Court Rules book in the jury room.

A trial court abuses discretion in denying a motion for mistrial if the court bases its decision on "untenable grounds" or uses "untenable reasons" in arriving at its decision. State v. Quismundo, 164 Wash.2d 499, 504, 192 P.3d 342 (2008). Regarding extraneous evidence, a court must grant a new trial "if a juror's use of extraneous evidence could influence the verdict and prejudice the appellant." State v. Fry, 153 Wash.App. 235, 220 P.3d 1245 (2009) (*quoting* State v. Boling, 131 Wash.App. 329, 332, 127 P.3d 740 (2006)). If, however, the trial court finds the extraneous evidence did not contribute to the jury's verdict, and the court is satisfied beyond a reasonable doubt, denial of a motion for mistrial is appropriate. Id.

In Fry, a juror used a dictionary for the definition of "substantial." Id. at 249. The juror did not share the dictionary or the definition with other jurors. Id. The record also supported the trial court's finding that neither the jury's verdict nor deliberation was affected by this conduct. Id.

Here, the trial court based its decision on tenable grounds. The trial court went above the Fry trial court. First, this case's trial court individually questioned all twelve jurors regarding their use or non-use of the Court Rules book. (RP 383-447). The presiding juror (#1), Leah Irwin,

"didn't really read anything." (RP 385). She additionally testified the book contents were not a topic of deliberation discussion and verified no juror referenced the book in terms of reaching a decision. (RP 386, 387). Dennis Bunger, juror (#11), "turn[ed] pages" but did not read the book. He also verified no jurors talked about the book. (RP 393-396). Mr. Bunger "thumbed through" the book during deliberations, but he testified he "didn't read through it," didn't discuss what he was thumbing through, and he thought the book did not impact jury deliberations. Id. Todd Miller, juror (#4), "tr[ied] to look for things for criminal law" in the table of contents but gave up because "it's a huge book." (RP 404, 406). Debra Vosburch, juror (#12), recalled the book was related to "rules for lawyers or something," but she merely "scanned…because [she] like[s] to read" on the first day of trial, not finding the definition she was looking for. (RP 414-416). She testified the book was not used during deliberation. Id. Jurors Rae Bailey (#10), (RP 390), Robert Fields (#6), (RP 401), Lisa Saucier (#2), (RP 407), Linda Starkovich (#3), (RP 410), Patricia Swanson[1] (#8), (RP 424), and Carrie Bechtel (#9), (RP 425), did not pick up the book and individually verified no juror referenced the book during deliberation. Jurors Amy Libenow (#5), (RP 398), and Linda Strand (#7),

[1] Ms. Patricia Swanson is incorrectly identified in the transcription of proceedings as Carrie Bechtel. (RP 424, line 14). Ms. Carrie Bechtel's testimony is correctly identified later in the proceedings. (RP 443, line 3).

(RP 411), did not even remember the book being in the juror room during deliberations. (RP 398).

Second, the court found "all of the jurors who attested that they looked at the book, attested they did not understand what they read." (CP 181). Appellant points to juror #13 as reading the book during deliberations; this is not supported in the record, as there were only twelve jurors. Mr. Bunger, juror #11, did not "read" the book during deliberations; he was the only juror who touched the book during deliberations, where he merely "thumbed through" the book with no impact on deliberations. (RP 393-396). Contrary to appellant's assertion, Mr. Bunger's "thumbing through" cannot be characterized as "read during deliberations." (App. 14). As seen above, there is no evidence to support the book was read or actually used in deliberations, nor did any juror testify they found material they used for any reason at all during the trial. The book had no effect on the jury.

CONCLUSION

The State of Washington presented the jury with sufficient evidence to allow a finding of guilty on all counts. The trial court did not abuse its discretion in denying appellant's motion for mistrial. This court should affirm the verdict and affirm the trial court's denial of appellant's motion for mistrial.

Dated this 3rd day of December, 2012.

Respectfully submitted,

GREG ZEMPEL
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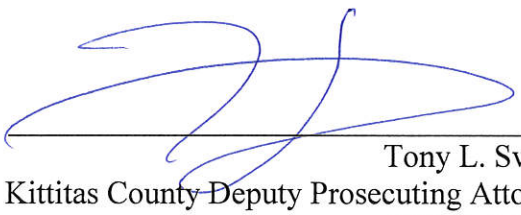
WSBA #19125



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COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

	)	
	)	No. 302326-III
STATE OF WASHINGTON	)	
vs.	)	PROOF OF SERVICE
	)	
ROBERT LEE WIDGRIG,	)	
	)	

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 5th day of December, 2012, affiant filed Amended Respondent's Brief electronically per agreement to serve by e-mail to:

Renee S. Townsley, Clerk	Ken Kato
Court of Appeals	Attorney at Law
Division III	1020 N Washington St
500 N. Cedar St.	Spokane, WA 99201-2237
Spokane, WA 99210	**E-Mail**
Electronic Filing	

containing copies of the following documents:

(1) Amended Brief of Respondent
(2) Proof of Service

SIGNED AND SWORN to (or affirmed) before me on this 5th day of December, 2012.

LORRAINE A HILL
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
SEPTEMBER 10, 2013

Lorraine A. Hill

NOTARY PUBLIC in and for the
State of Washington.
My Appointment Expires: 09-10-13