# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ANTHONY JAMES REEK,<br><br>Appellant. | No. 41630-1-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Quinn-Brintnall, J. — A jury found Anthony J. Reek guilty of one count of second degree burglary, two counts of forgery, three counts of first degree criminal trespass, two counts of making false or misleading statements to a public servant, and two counts of bail jumping. Reek appeals, alleging that (1) the trial court improperly admitted Reek's statements to the police, (2) the trial court erred by refusing to give Reek's proposed jury instruction regarding his out-of-court statements, (3) the trial court erred by denying his motion to dismiss the burglary charges for failure to make a prima facie case,[1] (4) ineffective assistance of counsel, (5) there was insufficient evidence to support his bail jumping convictions, (6) prosecutorial vindictiveness, and (7) cumulative errors resulted in a fundamentally unfair trial. In his statement of additional

[1] A motion to dismiss for failure to present a prima facie case is often improperly referred to as a "half-time" motion to dismiss.

grounds (SAG),[2] Reek argues that the State committed prosecutorial misconduct by violating motions in limine. Because the trial court did not commit reversible error and the remainder of Reek's claims lack merit, we affirm.

## FACTS

### Background

On September 5, 2007, Wal-Mart Stores, Inc. issued a "Notification of Restriction from Property" (trespass notice) to Reek. Ex. 1. In August 2009, Reek made two separate merchandise returns to the Poulsbo Wal-Mart. On August 17, 2009, Reek attempted a third return at the Poulsbo Wal-Mart. The first time he attempted the return, the supervisor on duty denied the transaction. Reek returned later in the day and attempted the return a second time. Philip Grimes, the asset protection coordinator at the Poulsbo Wal-Mart, became suspicious of the identification (ID) Reek presented to facilitate the return. While Grimes investigated the ID, Reek left the Wal-Mart without the ID or the merchandise he was attempting to return. Grimes reported the incident to the police.

Shortly after leaving the Wal-Mart parking lot, Reek was stopped by Officer Nick Hoke of the Poulsbo Police Department. Hoke arrested Reek for attempting to defraud Wal-Mart. Hoke recovered "about 20 pieces of paper, some [were] white, some [were] a higher-class stationery kind of green, and there's a literal cut and pasting of different identification/names." 1 Report of Proceedings (RP) at 93. All the documents had Reek's picture on them.

[2] RAP 10.10.

Procedure

On August 18, 2009, the State charged Reek with one count of second degree burglary. RCW 9A.52.030(1). On October 12, 2009, the State filed a first amended information charging Reek with one count of second degree burglary and one count of forgery. RCW 9A.52.030(1); RCW 9A.60.020(1). On June 8, 2010, the State filed a second amended information charging Reek with second degree burglary (counts I and II), forgery (counts III, IV, and V), bail jumping (count VI), and making a false or misleading statement to a public servant (count VII). RCW 9A.52.030(1); RCW 9A.60.020(1); RCW 9A.76.170, .175. On November, 1, 2010, the State filed a fourth amended information charging Reek with second degree burglary (counts I and II), forgery (counts III and IV), bail jumping (counts V, VI, VII), making a false or misleading statement to a public servant (counts VIII and IX), and first degree criminal trespass (counts X and XI). RCW 9A.52.030(1); RCW 9A.60.020(1); RCW 9A.76.170, .175; RCW 9A.52.070(1).

Reek failed to appear for scheduled court dates on three separate occasions.

Pretrial, the trial court heard Reek's CrR 3.5 motion to suppress the statements Reek made to Officer Hoke at the time of his arrest. Hoke testified that after he arrested Reek, he read Reek his *Miranda*[3] rights and that Reek indicated he understood his rights. Hoke then testified that Reek "admitted that he had made an identification card with a different name and that he was using it to try to defraud the store." 1 RP at 26-27. Reek testified that he was high on methamphetamine and "crashing" when he was arrested. 1 RP at 42. Reek testified that he did not make any statements to Hoke because "[he] fell asleep and [he] was in and out." 1 RP at 43. The trial court found that (1) Reek's testimony was not credible; (2) Reek knowingly,

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

intelligently, and voluntarily made the statements; and (3) the statements were admissible.

Reek's jury trial began on November 1, 2010. During trial, the State presented testimony from Officer Hoke, Grimes, Officer David Shurick of the Poulsbo Police Department, and Margaret Rogers, the court operations manager from the Kitsap County Clerk's Office for the superior court. After the State rested its case, Reek made a motion to dismiss the burglary charges for failure to present a prima facie case, arguing that Wal-Mart could not be considered a person or property for the purposes of the burglary statute. The trial court denied the motion to dismiss. The defense did not present any evidence, and Reek did not testify at trial.

On November, 3, 2010, the jury found Reek guilty of second degree burglary (count II), forgery (counts III and IV), bail jumping (counts V and VI), making a false or misleading statement to a public servant (counts VIII and IX), and first degree criminal trespass (counts X and XI). The jury also found Reek guilty of the lesser included charge of first degree criminal trespass (count I). On December 3, 2010, Reek was sentenced to 68 months of total confinement. Reek timely appeals.

## ANALYSIS

### CrR 3.5 Hearing

Reek argues that the trial court erred by admitting Reek's statements to Office Hoke because they were not knowing, intelligent, and voluntary. Because substantial evidence supports the trial court's finding that Reek made the statements knowingly, intelligently, and voluntarily, the trial court did not err by admitting evidence of Reek's statements to Hoke.

As an initial matter, Reek contends that the trial court's failure to issue written findings of fact and conclusions of law is reversible error. We disagree. CrR 3.5(c) requires that courts

> set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor.

But a trial court's failure to provide written conclusions "is harmless as long as oral findings are sufficient to allow appellate review." *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). Here, the trial court made the following oral ruling on the CrR 3.5 hearing:

> The one thing that's consistent in the testimony is that Mr. Reek was in the patrol vehicle when his rights were read. He indicated he made no statements prior to being advised of his rights, essentially. Therefore, any statements that were made were made after he had been advised of his rights and will be admitted.
>
> I'm not persuaded that the self-serving testimony about meth use, crashing simultaneously with being high, is credible. And I find that the statements were made knowingly, intelligently, and voluntarily, that he knew of the impact of his situation. The statements are admitted.

1 RP at 46-47. Because the court's oral ruling is sufficient to allow us to review whether substantial evidence supports the trial court's findings of fact, the trial court's failure to issue written findings and conclusions, although error, is harmless.

We review the trial court's findings of fact from a CrR 3.5 hearing to determine if they are supported by substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). We review de novo whether the trial court's conclusions of law are properly derived from its findings of fact. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012) (citing *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008)). We defer to the trial court's evaluation of witness credibility. *State v. Johnson*, 94 Wn. App. 882, 897, 974 P.2d 855 (1999), *review denied*, 139 Wn.2d 1028 (2000). A waiver of *Miranda* rights is knowing and intelligent if the officer orally advises the defendant of his rights, the defendant indicates he understands his rights, and the defendant volunteers information. *Johnson*, 94 Wn. App. at 897-98 (citing *State v.*

*Gross*, 23 Wn. App. 319, 324, 597 P.2d 894, *review denied*, 92 Wn.2d 1033 (1979)).

Here, Officer Hoke testified that he read Reek his *Miranda* rights and he asked Reek if he understood his rights before Reek made any statements. Further, Hoke testified that Reek did not appear to be under the influence of any drugs. The trial court determined that Hoke's testimony was more credible than Reek's testimony that he was high on methamphetamine and crashing while speaking to Hoke. A statement is knowingly, intelligently, and voluntarily made if the defendant was advised of his rights, and understood them, prior to making the statements. *Johnson*, 94 Wn. App. at 897-98. Hoke's testimony establishes that Reek was read his rights and indicated that he understood those rights prior to making the statements to Hoke. Therefore, substantial evidence supports the trial court's determination that Reek made the statements knowingly, intelligently, and voluntarily. The trial court did not err by admitting evidence of Reek's statements. *Johnson*, 94 Wn. App. at 897-98.

Proposed Jury Instruction on Defendant's Out-of-Court Statements

Reek contends that the trial court erred by refusing to give a jury instruction modeled on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 6.41, at 196 (3d ed. 2008) (WPIC).[4] The following exchange occurred during the discussion regarding jury instructions:

> THE COURT: The next one, the weight and credibility to [sic] out-of-court statements the defendant may have made.
>
> Does the State have a position on that?
>
> [STATE]: Your Honor, I think the general instruction giving the jury or indicating to the jury that they're the sole weights [sic] of the credibility of

[4] WPIC 6.41 states,

> You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

witnesses and that they're the judges of the evidence, I think that that's sufficient.
THE COURT: I agree. That will not be given.

2 RP at 180-81. "'[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case.'" *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997) (alteration in original), *cert. denied*, 523 U.S. 1007 (1998) (quoting *State v. Rice*, 110 Wn.2d 577, 603, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910 (1989)). Reek's proposed jury instructions, however, have not been designated as part of the record on appeal. From the designated record, we cannot determine exactly what instruction Reek proposed to the trial court. Therefore, the record is insufficient to allow review. RAP 9.2(b) ("If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party's objections to the instructions given, and the court's ruling on the objections.").[5]

Motion to Dismiss Burglary Charges

Reek argues that the trial court erred by denying his "half time motion to dismiss" the burglary charges.[6] Br. of Appellant at 18. Both here and at the trial court, Reek argued that the State failed to prove Reek intended to commit a crime against a person or property because Wal-

[5] Reek also argues that the trial court erred "when it did not conduct a hearing to allow formal objection to the court's instructions." Br. of Appellant at 16 (capitalization omitted). However, the trial court specifically asked for objections and exceptions to the proposed jury instructions and defense counsel noted several objections at that time. Therefore, the record belies Reek's assertion that the trial court failed to hear objections and exceptions to the jury instructions and we do not consider it further.

[6] Although Reek refers to his motion as a "half-time motion to dismiss," we discourage the continued use of this colloquial and misleading phrase. Therefore, we refer to Reek's motion by its proper phrase: a motion to dismiss for failure to make a prima facie case.

Mart cannot be considered a "person" for the purposes of the burglary statute. Reek's argument lacks merit.[7]

As an initial matter, we note that Reek cannot appeal denial of his motion to dismiss for failure to make a prima facie case because the case proceeded to verdict. "In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after the verdict, and (e) on appeal." *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996) (footnotes omitted), *review denied*, 131 Wn.2d 1006 (1997). At each point, the evidence "is more complete, and hence better, than the one before." *Jackson*, 82 Wn. App. at 608. The court will always use the best factual basis available when the defendant challenges the sufficiency of the evidence. *See, e.g.*, *Jackson*, 82 Wn. App. at 608 ("[A] defendant who presents a defense case in chief 'waives' (i.e., may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief."). A defendant is not barred from challenging the sufficiency of the evidence at a later stage of the proceeding but the court will analyze the claim using the "most complete factual basis available." *Jackson*, 82 Wn. App. at 609. Accordingly, we review Reek's claim using the same evidence and the same standard of review we use when reviewing any other challenge to the sufficiency of the evidence on appeal.

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[7] RCW 9A.04.110(17) states,

> "Person," "he or she," and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association[.]

Therefore, Reek's primary argument, that Wal-Mart cannot be considered a person for the purposes of the burglary statute, is not a meritorious challenge to the sufficiency of the evidence. Based on the general authority cited in Reek's brief, we assume he intended to challenge the sufficiency of the evidence supporting the jury's verdict and we address Reek's claim as a general challenge to the sufficiency of the evidence.

Evidence is sufficient if, when viewed in a light most favorable to the jury's verdict, 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. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Our role is not to reweigh the evidence and substitute our judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, because they observed the witnesses testify first hand, we defer to the jurors' resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence. *See State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To prove second degree burglary, the State must prove that the defendant entered or remained unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). It is undisputed that Reek unlawfully entered and remained in the Wal-Mart because Wal-Mart had previously issued a trespass order barring Reek from entering any Wal-Mart property.

Under RCW 9A.56.020(1) theft means

> (a) [t]o 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[.]

Here, the State presented evidence that Reek entered Wal-Mart and attempted a fraudulent

exchange of merchandise to complete an additional purchase. If Reek had successfully completed the fraudulent exchange, he would have received either the value of the merchandise or different merchandise he did not pay for. Therefore, the State presented sufficient evidence to prove that Reek entered Wal-Mart to commit theft, a crime against property. *See* RCW 9A.56.020; *State v. Barnett*, 139 Wn.2d 462, 469, 987 P.2d 626 (1999) ("An assault, for example, constitutes a crime against a person whereas a theft would typically constitute a crime against property.").

Given the trespass order, any reasonable jury could have returned a guilty verdict based on Reek's statements that he was intending to defraud Wal-Mart, the evidence establishing the attempted merchandise return, and the documents related to creating fake IDs. The State presented sufficient evidence to prove that Reek entered Wal-Mart with the intent to commit a crime against property, and sufficient evidence supports the jury's verdict finding him guilty of second degree burglary.

Ineffective Assistance of Counsel

Reek argues that he received ineffective assistance of counsel both during trial and at sentencing. Specifically, Reek contends that (1) defense counsel failed to object to the admission of the trespass notice from Wal-Mart, and (2) defense counsel failed to present mitigating evidence on Reek's behalf at sentencing.

To establish ineffective assistance of counsel, Reek must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d

1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). To demonstrate ineffective assistance of counsel based on failure to object, the defendant must show (1) that the trial court would have sustained the objection if raised, (2) an absence of legitimate strategic or tactical reasons for failing to object, and (3) that the result of the trial would have been different. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *McFarland*, 127 Wn.2d at 336-37; *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996)).

Reek has not presented any argument establishing why defense counsel's failure to object to the admission of the trespass order was deficient performance. The trespass notice was a relevant admissible business record. *See* RCW 5.45.020. Reek has offered no argument or authority to the contrary and we assume he has none. Therefore, defense counsel's failure to object to the admission of the trespass order was not deficient performance. Accordingly, Reek's claim of ineffective assistance of counsel fails.

We decline to consider Reek's argument that he received ineffective assistance of counsel at sentencing because it relies on facts not in the record on appeal. *McFarland*, 127 Wn.2d at 338 (a personal restraint petition is the appropriate vehicle for bringing matters outside the record before the court).

Insufficient Evidence - Bail Jumping

Reek also contends that there was insufficient evidence to support the jury's verdict finding him guilty of bail jumping because "the court clerk who testified was not present at the defendant's court appearances and she did not observe the defendant actually being handed a copy of the court's notice." Br. of Appellant at 25.

To prove bail jumping, the State must prove that (1) the defendant failed to appear before

a court, and (2) the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court. RCW 9A.76.170(1). Reek does not challenge the sufficiency of the evidence establishing his failure to appear. Instead, Reek alleges that the State failed to present sufficient evidence to prove his knowledge of subsequent court appearances. But Reek is mistaken. The State is required to prove only that Reek "was given notice of his court date - not that he had knowledge of this date every day thereafter." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

The court clerk, Rogers, testified that the court orders admitted into evidence demonstrated that Reek was given "[w]ritten and oral notice" of his court dates for November 6, 2009, July 13, 2010, and September 7, 2010, when they were set. 2 RP at 134. Rogers also testified that when a court date is set, the judge will normally say the court date aloud and the clerk in the courtroom will hand a written copy of the order with the new court date to the defendant's attorney. The clerk's testimony establishes a "routine practice" the trial court uses when giving a defendant notice of a subsequent court date. "Evidence of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." ER 406.

Based on Rogers's testimony establishing the trial court's routine practice, any rational jury could have concluded that the trial court acted in conformity with its routine practice when informing Reek of his subsequent court dates. The corresponding court orders further support the conclusion that the trial court said Reek's new court date out loud, in Reek's presence, and that an order with the new court date was given to Reek's defense attorney. Based on these

conclusions, any rational jury could find that Reek was given notice of his court date. Accordingly, sufficient evidence supports the jury's verdict finding Reek guilty of the bail jumping charges.

Prosecutorial Vindictiveness

Reek alleges that the State increased the number of charges against him in retaliation for "exercis[ing] his right to have the matter tried." Br. of Appellant at 30. But the additional charges against Reek were based on subsequent criminal conduct and supported by the evidence. Reek's prosecutorial vindictiveness claim fails.

Prosecutorial vindictiveness is the intentional filing of more crimes, or more serious crimes, in retaliation for a defendant's lawful exercise of a procedural right. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). "A prosecutorial action is vindictive only if it is designed to penalize a defendant for exercising protected rights," but it is not vindictive when new evidence or subsequent criminal conduct justifies additional charges. *Gamble*, 168 Wn.2d at 187 (citing *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006)). "A presumption of vindictiveness arises when a defendant can prove that 'all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.'" *Korum*, 157 Wn.2d at 627 (quoting *United States v. Meyer*, 810 F.2d 1242, 1246 (D.C. Cir.1987)).

Here, the State amended the original information to include charges for forgery, making false or misleading statements to a public servant, criminal trespass, and bail jumping. The forgery charges were based on the evidence of forged ID found in Reek's vehicle. The bail jumping and making false or misleading statements charges resulted from Reek's failure to appear at subsequent court hearings. The criminal trespass charges were lesser included offenses arising

out of the original burglary. Because all the subsequent charges were based on the evidence or subsequent criminal conduct, Reek has failed to prove a realistic likelihood of vindictiveness. *Korum*, 157 Wn.2d at 631-32. Without establishing a presumption of prosecutorial vindictiveness, Reek's claim must fail.

Cumulative Error

Finally, Reek alleges that the cumulative errors by the trial court resulted in a fundamentally unfair trial requiring reversal. Under the cumulative error doctrine, a defendant may be entitled to a new trial if several trial errors, standing alone, are not grounds for reversal, but, when combined, the errors denied the defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because the trial court's only error was failure to issue written findings of fact and conclusions of law, an error we determined was harmless, the cumulative error doctrine does not apply.

SAG issue - Prosecutorial Misconduct

In his SAG, Reek alleges that the State violated motions in limine by referring to the IDs recovered from Reek's vehicle as "fake" or "false." Before trial, the trial court granted Reek's motions in limine to prohibit (1) reference to Reek providing false names in the May 10, 2010 police report, and (2) reference to "fake IDs" in the August 17, 2009 police report. Reek alleges that the State violated the motions in limine by using the terms "fake IDs," "false identification," and "false name" during the CrR 3.5 hearing and in closing argument. Based on this alleged violation of the motions in limine, Reek argues that the State committed misconduct under RPC 8.4 and contempt of court pursuant to RCW 7.21.010, resulting in reversible error.[8] But Reek

[8] We note that RPC 8.4, "Misconduct," and RCW 7.21.010, "Contempt of court," are not the appropriate standards for determining whether the State's comments were reversible error.

misunderstands the scope and applicability of motions in limine. Here, the State did not violate the motions in limine or commit misconduct and Reek's SAG claim fails.

The trial court's in limine order prevented the State from eliciting *trial testimony* from the officer concluding that Reek was using fake or false IDs. This was because it was the jury's responsibility to determine whether the IDs were, in fact, fake or false. Reek first alleges that the State violated the trial court's in limine order when it questioned him about the fake IDs during the CrR 3.5 hearing. But Reek submitted "the following Motions In Limine *for trial* in the above-entitled matter." Clerk's Papers at 78. On their face, the motions in limine do not apply to a CrR 3.5 hearing held before trial begins. Therefore, the State did not violate the trial court's ruling or commit misconduct by asking Reek about the "fake IDs" during his testimony at the CrR 3.5 hearing.

Reek also argues that the State violated the motions in limine during closing argument. In closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Here, the State's argument that Reek used and possessed fake IDs is a reasonable inference based on the evidence presented at trial, specifically, Reek's possession of several pieces of identification containing his picture and different names. Accordingly, the State's reference to fake IDs during closing arguments was not improper.

The trial court did not err by admitting evidence of Reek's statements to the police. We decline to review the trial court's refusal to give Reek's proposed jury instruction because Reek has failed to perfect the record to allow review. Sufficient evidence supports Reek's convictions for second degree burglary and bail jumping. The State did not engage in prosecutorial

vindictiveness, and Reek did not receive ineffective assistance of counsel. In addition, Reek's SAG claim is meritless. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

PENOYAR, J.

JOHANSON, A.C.J.