

# WHO ARE YOU?

## 2019 2020 MOCK TRIAL

Case Author: Judge Robert Lewis  
Clark County Superior Court

Washington   
**YMCA YOUTH  
& GOVERNMENT**



## INTRODUCTION

Every attorney who practices criminal law quickly learns two basic approaches for defending a client who insists that someone else committed the crime charged – in other words, that the authorities have misidentified the culprit. The first technique is the shotgun method. Blast as many little holes in the prosecution’s case as you can, criticize the thoroughness of the police investigation and point out the multitude of other, equally likely suspects. After all, why should a jury have only one reasonable doubt when so many are available?

The second technique involves a laser beam. Pick another suspect and constantly emphasize to the jury that this alternative has just as good (or better) a motive, opportunity and ability to commit the crime as the innocent defendant. Focus all of the attention where it belongs, on suspect number two. This may create only one reason to doubt, but it’s a really big one.

Both methods have their advantages and disadvantages. The shotgun approach allows the State to cry nit-picking and flyspecking, that the defense is attempting to distract from the “real” issues through red herrings and straw men. On the other hand, focusing on a single alternative suspect gives the prosecution a chance to put the defense theory on trial, to poke their own tiny holes into the other side’s circumstantial evidence.

The attorneys for this year’s defendant, Sydney Carden, will need to face these options head-on, fitting the evidence into a persuasive explanation of why the defendant has been wrongfully accused. And the State’s attorneys must be flexible, prepared to meet and thoroughly discredit whichever approach the defendant may choose. Our story is fictional, but its factual skeleton is a real store burglary trial from a few years ago. Identity is the main issue in both cases and I hope students enjoy working through the complexity here to discover, if they can, who done it.

Two author’s notes: First, I have attempted to present current problems in identity theft, using references to recent technology. However, as anyone who knows me can attest, I am always hopelessly behind the times. The kids (and now the grandkids) have to program things for me. So if any character sounds more “dial up” than “5G”, please accept this advance apology.

Second, coaches and advisors may recognize the name of Professor Sage Lofftiss’s mentor. Dr. Wesleyan Roberts was the memorable expert on the perils of eyewitness testimony created by Mike Lang in the 2009-10 *Burning Rivers* case. It was a pleasure to review that declaration and to recall all of the great mock trial cases edited by Judge William Downing. Hopefully, Professor Lofftiss updates the research and brings this important issue to the attention of a new generation of students.

The author would like to thank Brent Gaither and Erin FitzGerald for their assistance, especially with the cover art. We’ll miss you, Brent. Good luck to everyone!                      -Robert Lewis

**Plaintiff's Witnesses**

Carey Cash, Local Reality Star

Sam Drucker, Manager, LivGud4Less Department Store

Payton Bailee, Customer Relations Specialist, Sunshine Federal Credit Union

Detective Raz Gerard, Alki City Police Department

**Defendant's Witnesses**

Sydney Carden, Defendant

Professor Sage Lofftiss, Sand Desert University

Kahuna Thornhill, Publisher, *The Truth Behind LivGud4Less* website

Avery Ataro, MuvR Driver

**Exhibit List**

Exhibit 1 - Store Diagram

Exhibit 2 - Security Report

Exhibit 3 - ATM Printout

Exhibit 4 - Photograph -- Umbrella

Exhibit 5 - MuvR Receipt

Exhibit 6 - Screen Shot

**STIPULATIONS:**

The relative heights of the witnesses and any characters they describe are accurately stated in the declarations, irrespective of the heights of the real-life individuals assigned to play these roles.

The parties do not dispute the dates and purchase amounts of the credit card charges made on Carey Cash's accounts between August 23 and August 27, 2019 and Carey Cash and Detective Raz Gerard may testify about these charges.

A representative of the security company has verified the information contained in Exhibit 2 and any witness may testify concerning the contents of that report.

Because the video footage from the surveillance cameras was inadvertently destroyed, a description by any witness who viewed this footage of its contents is admissible and the weight to be given this testimony, if any, shall be determined by the jury.

The written statements of the witnesses were given under oath and certified as true and accurate to the best of that witness' knowledge and memory.

The exhibits have been authenticated and are admissible.

# Pleadings

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PINE

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 19-1-01101010
	)	
vs.	)	INFORMATION
	)	
SYDNEY CARDEN,	)	
	)	
Defendant.	)	

COMES NOW the Prosecuting Attorney for Pine County, Washington, and does by this inform the Court that the above-named defendant is guilty of:

**COUNT 1 – IDENTITY THEFT, FIRST DEGREE**

That SYDNEY CARDEN, in the County of Pine, State of Washington, on or about August 22-27, 2019, knowing obtained, possessed or used a means of identification or financial information of another person, with the intent to commit, aid or abet any crime and thereby obtained credit, money, goods or services in excess of \$1,500 in value, a violation of RCW 9.35.020 (1)-(3).

**COUNT 2 – POSSESSION OF STOLEN PROPERTY SECOND DEGREE**

That SYDNEY CARDEN, in the County of Pine, State of Washington, on or about August 22-27, 2019, knowing received, retained or possessed a stolen access device, with knowledge that this property had been stolen, and appropriated the property to the use of someone other than the true owner or person entitled thereto, a violation of RCW 9A.56.160 (1)(c).

DATED OCTOBER 10, 2019.

STATE OF WASHINGTON  
PINE COUNTY

BY: /s/  
Deputy Prosecuting Attorney

# **Jury Instructions**

### **Instruction No. 1**

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of a charged crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.

### **Instruction No. 2**

All jurors must agree in order to return a verdict.

### **Instruction No. 3**

Evidence may be direct or circumstantial. Direct evidence refers to something stated by a witness who has directly seen or otherwise perceived something that is at issue in the case. Circumstantial evidence refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue. Both types of evidence are valuable and entitled to be given significant weight.

### **Instruction No. 4**

You are the sole judges of the credibility of each witness and the value or weight to be given to his or her testimony. In considering a witness's testimony, you may consider these things: the opportunity of the witness to know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory; the manner of the witness while testifying; any personal interest that the witness might have in the case; any bias or prejudice shown by the witness; and the reasonableness of the witness's statements, considering all of the other evidence.

### **Instruction No. 5**

A witness who has special training or experience may be allowed to express an opinion in addition to testifying about facts. You are not required to accept his or her opinion. To evaluate opinion evidence, you may consider the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information.

### **Instruction No. 6**

In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given to you for evaluating any witness's testimony, you may consider other factors that may bear on the accuracy of the identification, including:

- (1) The witness's capacity for observation and recall;
- (2) The opportunity of the witness to observe the perpetrator;
- (3) The emotional state of the witness at the time of the observation;
- (4) The witness's ability, after observing the perpetrator, to provide a description; and
- (5) The extent to which outside influences may have affected the witness's identification.

### **Instruction No. 7**

To convict the defendant of the crime of identity theft, first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 22-27, 2019, the defendant knowingly obtained, possessed or used a means of identification or financial information of another person;
- (2) That the defendant did so with the intent to commit, aid or abet any crime;
- (3) That the defendant knew that the means of identification or financial information belonged to another person;
- (4) That the defendant obtained credit, money, goods or services in excess of \$1,500 in value from the acts described in element (1); and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

### **Instruction No. 8**

To convict the defendant of the crime of possession of stolen property, second degree, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about August 22-27, 2019, the defendant knowingly received, retained or possessed stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant appropriated the property to the use of someone other than the true owner;
- (4) That the stolen property was an access device; and
- (5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

**Instruction No. 9**

**A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.**

**Instruction No. 10**

**A person knows or acts knowingly with respect to a fact or circumstance when he or she is aware of that fact or circumstance.**

**If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.**

**Instruction No. 11**

**Means of identification means information or an item that does not describe finances or credit, but is personal to or identifiable with an individual including: (a) a current or former name, telephone number, electronic address, or other identifier of the individual; (b) a social security, driver's license, or tax identification number of the individual; and (c) other information that could be used to identify the individual.**

**Instruction No. 12**

**Financial information means information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit, including (a) account numbers and balances; (b) transactional information concerning an account; and (c) codes, passwords, social security numbers, tax identification numbers and other information held for the purpose of account access or transaction initiation.**

**Instruction No. 13**

**Access device means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.**

**The phrase "can be used" refers to the status of the access device when it was last in possession of its lawful owner, regardless of its status at a later time.**

**Instruction No. 14**

**Stolen means obtained by theft. Theft means to wrongfully obtain or exert unauthorized control over the property of another, or to appropriate lost or misdelivered property of another, with intent to deprive that person of such property or services.**

# **Witness Statements**

## STATEMENT OF CAREY CASH

Wouldn't it be awesome to be born with a name like Carey Cash? It shows that your parents are really thinking ahead, trying to give you a moniker that grabs attention and puts their progeny in the spotlight. Unfortunately, my folks did not have any imagination, either in baby names or really anything else in life. To protect my family from the paparazzi, and the paparazzi from my boring relatives, I won't divulge my given name here. Rest assured, it was legally changed years ago, as soon as I hit the age of eighteen. I chose it myself, just as I have spent most of my adult life taking charge, doing the things I needed to do to get the recognition I deserve.

Perhaps you've heard of me? No? Really? You have apparently been living inside a law book or under a rock for too long. I've been a celebrity here in Alki City for a while now and I have a number of real folks – not robots, we have ways to check – who follow my daily exploits on social media of various types.

If you'd seen me in high school, you would never have guessed that I would become such a big deal. Outside my very small circle of friends, I was unknown and unappreciated. Although the rest of my grades were so-so, I did have a real talent for computer programming and video production. Unfortunately, a lot of young people are interested in those areas these days and an aptitude for the technical aspects of computers, however lucrative, seldom gets you the kind of attention I craved. So I shifted my focus to the other side of the webcam and started my career as a content creator.

Actually, I started on both sides of the camera, producing my own webumentaries on Youtube and other platforms. First, I focused on joining stunts that other people were also doing on the internet, like Selfies in Serious Places (I went to a local cemetery during a military funeral). But most of these trendy things were either boring or dangerous.

Then it occurred to me – why not film myself watching the things other people were doing and comment on how really boring or dangerous they were? The supply of stupid things other people were filming was endless, so I could fill all the air time I needed. In addition to commentary, I practiced a number of shocked and disgusted gestures and facial expressions and curated a bunch of sarcastic catch phrases, including my signature "WOWWZZA!" Soon my own channel, *Stop That!! with Carey Cash* – was born and my pieces regularly went viral.

Before long, everyone was copying my idea, watching videos and reacting to them for all to see. That's the nature of the content business, very cutthroat and competitive. Fortunately,

1 I was noticed by a local television affiliate that wanted to create programs based on local media  
2 stars, both to bolster its dwindling broadcast ratings and to create a streaming presence. So I  
3 was offered the opportunity to be one of the original contestants in a reality show called  
4 *Faker's Dozen*.

5  
6 The concept was simple – eight contestants (see, we weren't even a real dozen) were  
7 placed in situations where we tried to trick someone into doing something with us – join a  
8 fraternity at the local college, row with a dragon boat team, and so on. Hidden cameras picked  
9 up the action and we usually convinced the mark to go along. At the end of each episode, the  
10 person tricked would be told of the hoax and asked to name the person they were most  
11 suspicious of during the ruse. That person would be eliminated until only the most persuasive  
12 faker was left. Guess who won?

13  
14 It was a great gig, and the *Behind the Scenes at Faker's Dozen* specials were even more  
15 popular. All that backbiting and deception between contestants made for riveting TV. I was  
16 raking in royalties and ad revenues from *Stop That!!* I even made money with my one-on-one  
17 podcast "*Would I Lie to You?*" where I would read another local personality a "news article" and  
18 he or she would try to guess if it was fictitious.

19  
20 But in my business, you constantly come up with something new, or the customers  
21 move on to the next fad. A couple of years ago, when my career was ebbing, I made a decision  
22 that I will always regret. I hired a couple of guys to rough me up and steal my pocketbook on  
23 the sidewalk near a downtown business with exterior security cameras. I hoped to generate  
24 some publicity and a little sympathy.

25  
26 This was the most complex production I had ever attempted and I designed it right  
27 down to the last detail – fight choreography, where the lighting was best to obscure the faces  
28 of everyone (except me) so that my assistants wouldn't get in trouble later. I knew the police  
29 wouldn't fall for wound make-up, so we worked out how to do some damage to my face, hands  
30 and arms without going overboard.

31  
32 At first, it worked like a charm and I received a very sympathetic reaction. But my  
33 devotion to detail ultimately ruined my plans. Store security noticed that the cameras had  
34 recorded me outside the store on a number of days prior to the incident, sometimes in the  
35 company of my "assailants". As more details came out, my assistants panicked and contacted  
36 the local authorities. At first, the city attorney was going to make an example of me by  
37 charging me with false reporting. But those charges were dropped once the press lost interest  
38 in the story.

1           The negative publicity has haunted me ever since and for a while I was shunned as a  
2 content source by most of the people I wanted to work with in the business. I quietly worked  
3 the production side and humbly tried to show everyone that they could trust me again. I  
4 turned down a chance to appear on *Dancing With The Rats*, a sensational rip-off series that  
5 featured infamous people ballroom dancing with upstanding dance instructors. That was not  
6 the kind of image I wanted to build.

8           Recently, I sold a local station on the concept of a camera crew following me around,  
9 filming my reformed lifestyle of honest fun with my loyal entourage (yes, I still have one), my  
10 efforts to help others get started in the content production business and my heartwarming  
11 interactions with my two rescue ferrets. I thought the ferrets were a unique touch –everyone  
12 rescues dogs and cats, but who helps these high-strung weasels? The audience is even going to  
13 get to name them as part of their interaction with the show.

15           *Cash Gets It Now* is the working title, but production hasn't started on the first season.  
16 Although the affiliate remains very interested and there was even a possibility of regional  
17 syndication, no one has been willing to fund my local production company. I guess I can't  
18 blame them with my past, but I was really disappointed that we could not be ready for this fall.  
19 I am desperately trying to arrange funding, so we can slot in as a midwinter replacement.

21           As bad as my finances have been, things got even worse after August 22, 2019. My  
22 posse and I had been out comparison shopping around town, looking for the best deal on a  
23 new, more durable habitat for my ferrets. People don't realize this (I certainly didn't), but these  
24 mischievous creatures can be very destructive. The two of them completely chewed through  
25 their original plastic cage in less than a week.

27           These kinds of pet structures are often sitting in the back storerooms of stores, so it  
28 pays to drive around and not rely on the online offerings. We must have gone to 10 stores in  
29 the area – we even had the MuvR driver take us out to Barryton. One of the last places we  
30 looked was LivGud4Less. I've been in there many times before, especially in the last couple of  
31 years, because the store features a lot of discount stuff. I thought there was a pet section in  
32 the back, but I guess not. I didn't notice that I dropped my pocketbook there, since this was the  
33 last stop before I went home and I didn't end up making any purchases.

35           On August 23, I stayed home and brainstormed ideas for the show – reality doesn't just  
36 happen. On August 24<sup>th</sup>, I spent most of the day with my entourage at a local watering hole,  
37 watching sports. They drove and paid that day, so I didn't even look for my pocketbook. To tell  
38 you the truth, I don't remember what I did on Sunday – probably laid in bed all day. I noticed

1 my phone was flashing and buzzing with missed calls and messages, but I didn't feel like talking  
2 to anyone except my crew. I didn't check my messages until late afternoon on the 26<sup>th</sup>. That's  
3 when I received the messages from Detective Gerard and the store manager and realized that I  
4 was in trouble.

5  
6 The next day, I notified my credit card companies, my credit union and IDSALVE, the  
7 company I pay to protect me from identity theft and to compensate me if my credit reputation  
8 is harmed. I've submitted a claim for \$100,000, because this situation has made it even harder  
9 for me to get production financing. IDSALVE hasn't ruled on my claim or paid anything to me  
10 yet.

11  
12 My pocketbook contained three credit cards, including the Magnesium Deluxe, where  
13 most of the charges were incurred. There were charges on the other two cards as well, though  
14 those losses were not as great. In four days, there were more than 75 unauthorized charges,  
15 many of them to sites and businesses where I shop. That makes the misuse of my credit even  
16 more onerous – now those places won't do business with me at all, until I either reimburse  
17 them for their losses, or jump through a bunch of humiliating hoops to verify purchase of even  
18 the smallest item. Grand total of credit card losses was over \$7,500 before I could stop use of  
19 the accounts.

20  
21 My Sunshine Federal Credit Union debit card was also lost in the theft. You need a pin  
22 number to make withdrawals with that card, but I had trouble remembering the long numbers  
23 and the CU required you to reset the thing every six months. So my latest passcode was  
24 written on a slip of paper inside the pocketbook and the thieves must have figured out what it  
25 was. \$12,000 was cleaned out of my account in just one day.

26  
27 The worst thing about this nightmare is how many people are not willing to believe that  
28 I am the victim of a very real series of crimes. The police don't have time to deal with all of  
29 hardships this is causing me, so I have to do it myself. Each charge has to be separately  
30 disputed, either through my own efforts or by providing statements and documents to  
31 IDSALVE. Every voice on the phone – when you finally reach someone - seems to be suggesting  
32 that I am making this all up and sometimes he or she expressly makes that accusation. And  
33 every news story about this real crime had to dredge up the staged robbery and my history as a  
34 celebrity "faker".

35  
36 All I want is justice for the losses I have suffered and to be seen for what I am – the  
37 victim of a crime. I don't have bruises this time, but I have pain. WOWWZZA!

1 STATEMENT OF SAM DRUCKER

2  
3 For three years, I have served as the store manager of the LivGud4Less department  
4 store in Alki City, Washington. LGL, as it is known to most of the employees, has been a  
5 nationwide chain of retail outlets since 1970. Even after our recent acquisition by a larger  
6 competitor, we are proud to be strong and semi-independent, offering a vast selection of  
7 quality merchandise at discount prices.  
8

9 LGL has been downsizing its brick and mortar locations in recent years, as corporate  
10 struggles to keep up with the aggressive turn of many consumers to etail shopping. The Alki  
11 City location is actually the third “box” that I’ve managed – the other two stores each closed a  
12 few months after I arrived to lead them. Contrary to my nickname among the employees, the  
13 Grim Reaper, I am not sent to stores to oversee their demise. I have no reason to believe that  
14 Alki City LGL is about to disappear. On the contrary, sales have increased under my watch,  
15 thanks to new, eye-catching displays and some timely promotional events.  
16

17 LGL is the anchor store of South Central Plaza, a small strip mall on the outskirts of  
18 downtown, just off Highway 990. The layout of the store is typical for a ranch (one-floor)  
19 department store, with an open feel created by high ceilings, wide aisles and a blending of one  
20 department into another through interconnected displays of merchandise.  
21

22 Exhibit 1 is an overall diagram of the store. The front doors, the only customer  
23 entrance, are located in the center of the store. There are two sets of entry doors, with a cart  
24 and basket corral in the foyer. After you walk through the second set of automatic doors, there  
25 are queuing lines for purchasers created by movable posts and separation strips on the right  
26 and then the main bank of registers. The men’s department is in the right hand corner behind  
27 the registers. If you follow the perimeter aisles around the store, you pass various  
28 departments, such as shoes, home appliances, pet supplies, linens and children’s wear and  
29 finally come back to the front through women’s clothing.  
30

31 In the upper left hand corner of the store diagram, you’ll find our cashier’s office and  
32 the loss prevention office, which has a bank of video monitors linked to the security cameras.  
33 During the day, security employees sit in this office and watch for shoplifters. The office is  
34 empty at night, but the cameras still monitor and automatically record if any movement  
35 detected. I’ll describe this in more detail when I discuss the security features. Also in this  
36 corner of the store is my office, bathrooms, a layaway and receiving area and other services like  
37 the optometrist. There are emergency doors at each corner in the back of the store. Most of

1 these areas are marked with their purpose, except the offices and the receiving areas, which  
2 are marked "Employees Only."

3  
4 Throughout the store there are panels and partial walls, which divide some of the  
5 departments. As a result, you cannot see completely through the store, front to back. For  
6 example, shortly after you enter, a panel shields a collection of outdoor wear – boots, gloves,  
7 knit caps, that sort of thing – from the main aisle. In the middle of this outdoor area is a kiosk  
8 of umbrellas, which is not visible from the front door. Its location is marked on Exhibit 1. You  
9 have to wind through a couple of short aisles to reach a location where this kiosk is visible.

10  
11 The cashier's room, which is also marked on Exhibit 1, is actually two separate rooms  
12 with a locked door between them. When you enter the room from the store, you come into  
13 what we call the countdown room. This is where the cashiers count the money from their tills,  
14 making sure they balance. This is always done in the presence of a manager or assistant  
15 manager. After this task is completed, the tills are handed through a slot in a window into the  
16 auditor's room. The auditor is the chief cashier for the shift, assigned to go into the room  
17 periodically to receive and secure money, tills and lost items. The auditor is in the room at the  
18 end of a shift, at closing and whenever an employee asks that something be secured. Except  
19 for the manager and the assistant managers, only the auditor has access to that room, through  
20 a key that can be checked out from the shift manager. The auditor also has to sign the key back  
21 in with the shift manager, before placing it on a hook in the manager's office.

22  
23 The auditor loads most of the money into bank pouches, which are taken at closing each  
24 day to our local bank's night drop. Only a few hundred dollars are left in the auditor's office, to  
25 refresh the tills in the morning. Almost everyone uses credit and debit cards these days, so we  
26 don't hold over a lot of cash. This "seed money" is locked in a large metal box, along with any  
27 other valuables that might be in the lost and found – for example, a credit card someone left  
28 behind. Although we call the box the "safe" because it has a combination lock on the front, I've  
29 never really worried about securing it, because it is already behind several locked doors. The  
30 combination is still set at the original default – 123456 – and we usually leave it set on those  
31 numbers, so you can open and close the box without the combination.

32  
33 The store's security features are primarily designed to prevent shoplifting, a big problem  
34 in any open shelf facility. We have a bunch of monitoring cameras, most of them located near  
35 the ceiling, pointing at a series of fixed locations. The cameras cannot move – if someone that  
36 security wants to watch goes to a different part of the store, they just look at the monitor for  
37 the camera pointed at the new location. Two cameras are pointed at the exterior of the front  
38 doors and one camera is set on each emergency door.

1  
2        These cameras are spaced periodically and pointed down so the entire store interior is  
3 covered by at least one camera. A few are zoomed in on locations where thieves are a special  
4 concern. Sure, you can see the cameras if you look for them, although you wouldn't necessarily  
5 know which area a camera was monitoring, or whether there were other cameras watching you  
6 from behind a number of dark panels mounted on the upper walls – no comment on whether  
7 there are extra cameras behind any of these little windows.

8  
9        Each camera is hooked to a monitor and a recording device. While the store is open,  
10 the cameras record on a continuous basis. After hours, a camera will automatically record if an  
11 attached sensor detects motion. This recording will continue until five minutes after the sensor  
12 stops detecting motion. Because of the large volume of digital data that is recorded each day,  
13 the recordings are not kept in our system for more than 72 hours. Unless a particular recording  
14 is specifically preserved during that time, the devices record over these images. Staff can  
15 watch recordings, and can also preserve "freeze frames" images from the cameras.

16  
17        The store is also protected by an alarm system at night. The person with management  
18 responsibilities at closing makes sure the emergency doors are locked and that all employees  
19 and customers have exited the front of the building. The last employee and the shift manager  
20 leave together through the front doors, and the manager sets the alarm from a panel in the  
21 foyer. After the alarm is set, the outer door is locked. To enter the building after that,  
22 someone has to unlock the exterior doors with a key, enter the foyer and put in a code to  
23 disable the alarm. Disabling the alarm automatically activates the automatic doors and turns  
24 on the store lights.

25  
26        On August 23, 2019, only four people had a set of keys that opened all of the doors to  
27 the store and an assigned code to disable the alarm. Besides myself, these three employees  
28 were the assistant managers -- Sydney Carden, Kahuna Thornhill and Chas Darney. Two of  
29 these assistants are no longer with the store, for obvious reasons, and their keys have been  
30 assigned to my new assistants, who were both employees promoted from within the store. I've  
31 had three other assistant managers during my tenure at the store and each of them had keys  
32 and codes while they were there. But I personally checked their keys back in when they left  
33 employment with LGL, just as I did when I fired Sydney and Kahuna.

34  
35        The keys are standard metal and do not have biometric or electronic gizmos in them, so  
36 I suppose any person could use them. The keys for the assistant managers were cut from my  
37 master keys by a local hardware store, but that couldn't happen with the duplicates. Each of

1 those keys has "Do Not Duplicate" stamped on them in big letters. So a key cutter would be in  
2 big trouble if they ignored that warning.

3  
4 Each assistant manager is provided with an individual code for the alarm panel. That  
5 way, corporate knows who set and disabled the alarm every time. I assigned each code, by  
6 calling in to security with the individual assistant and orally providing authorization and my  
7 master code. We would have to follow the same procedure to change the code. I like to keep  
8 things simple, so the five digit codes I assigned were similar, based on my birthday, with only  
9 one or two different numbers. They weren't in sequence and I don't have to worry about  
10 someone trying multiple guesses to disable the alarm. After three tries, the system would lock  
11 up and security would be notified that someone was tampering with the panel.

12  
13 As store manager, I work most of the day, contrary to what Kahuna may try to tell you. I  
14 have an assistant opening and closing manager each day, with varying shifts so that each of  
15 them knows how to perform all of the duties. On August 23, Sydney was the opening assistant.  
16 My shift started around 11:00am and I stayed until closing. Kahuna was the closing assistant  
17 that evening. That overlap is not unusual, since closing is a bigger job and you are making sure  
18 everything is secure.

19  
20 All three of us were on duty around 3:00pm that day, because there is a short overlap  
21 between the shifts of the assistant managers. Kahuna came into the manager's office to clock  
22 in while I was talking to Sydney – again - about the need to be punctual. When I first hired  
23 Sydney in March 2019, you couldn't have asked for a more conscientious employee. But during  
24 the summer, Sydney was gone more often than present for a shift and was habitually late. The  
25 excuse was always something medical, like a cold or migraine headaches. Personally, I think it  
26 was "summer flu" especially after Sydney and Frankie Baker started hanging out together. I had  
27 to constantly remind Sydney of the need to show up on time, especially to open, so the other  
28 employees could be ready to go by store opening at 8:00am.

29  
30 Kahuna was a few minutes late that day, so I had to lecture both of them, so it didn't  
31 look like I was playing favorites. Kahuna gave me some lip, as usual, then started out towards  
32 the store to make opening rounds. Almost as an afterthought, Kahuna reached into the hooded  
33 sweatshirt that Thornhill always wears, even in the summer. Kahuna pulled out a leather  
34 pocketbook and dropped it on my desk. "I found this near the entry doors" was the only  
35 explanation I received as to where the pocketbook had been located.

36  
37 I checked the pocketbook for identification and found a driver's license for Carey Cash.  
38 When I read the name out loud, Sydney's eyes bugged out and there was an audible gasp,

1 followed by at least a dozen “OMG! Carey Cash! OMG!” I had never heard of this person, but  
2 Sydney finally explained that Cash was some sort of local celebrity. Carden watched while I  
3 inventoried the pocketbook – no cash, three credit cards, a debit card and a couple of pictures  
4 and business cards. As is my practice, I wrote down all of the card numbers and put them in a  
5 file in my office, in case the police needed them later. Then I took the pocketbook over to the  
6 auditor’s room and placed it in the safe.

7  
8 Cash didn’t come back that day, so the pocketbook was still in the safe when I closed the  
9 auditor’s room. No one else had left any credit cards or valuables that day, so the only other  
10 item in the safe that night was the seed money for the tills, \$400 in bills and some coins. We  
11 went through the standard closing routine that night and I watched Kahuna set the alarm. If  
12 Thornhill tells you any differently, then Thornhill is lying, pure and simple. Afterwards, I went to  
13 my home, which is about a 30 minute drive from the store.

14  
15 Around 3:30 that morning, I received a call from Kahuna that the store was broken into  
16 and the police were on the scene. When dispatch checked with security, their records  
17 indicated that someone had disabled the alarm about an hour earlier. Kahuna was already  
18 there, although I don’t know why security would have called an assistant manager. I pulled on  
19 my clothes and drove down to check on what was missing.

20  
21 Nothing was taken from the aisles that I could see. I was later told that one of our  
22 backpacks was stolen and that an umbrella was stuck in the back door. I later saw the umbrella  
23 in the store’s video, being held by the thief. It was one of those flimsy, almost sheer fabric  
24 umbrellas, the kind the wind easily rips apart. It looked like the umbrella shown in Exhibit 4,  
25 although I only saw it on the video.

26  
27 Both doors of the cashier’s room were wide open and the safe was empty. I told the  
28 officers about the cash that was missing, but I forgot about Carey Cash’s pocketbook, which  
29 was also gone. A couple of days later, I suddenly recalled this oversight and remembered the  
30 inventory of items and card numbers. I immediately called and provided that list to the police.  
31 I’m sorry about the delay in reporting, but it was an honest mistake.

32  
33 Gerard asked about the cameras that night and we watched the footage from the break  
34 in together. I don’t believe that Thornhill was in the loss prevention office with us. I noticed  
35 two things as we followed the burglar through the store. First, the person who entered was  
36 definitely shorter than the security stanchions at the front doors. Those are the plastic towers  
37 that scan for security tags and sound an alarm if people try to leave without paying for

1 merchandise. Even taking into account that the cameras are pointed down at an angle, you  
2 could see a gap of several inches between the top of the stanchion and the burglar's head.

3  
4 Second, the person obviously had intimate knowledge of the store and its layout. This  
5 person was always positioned so that the face was never exposed to a camera. He or she went  
6 directly to the umbrellas and knew the shortest route to the kiosk. The umbrella is then held to  
7 keep the face covered even when a camera is zoomed in or a new one takes over. That's true  
8 even in the cashier's room. Only someone who has been in that room, and watched the  
9 monitors in the loss prevention office, would know how to position the umbrella.

10  
11 At one point, a camera picks up a distinct silhouette on the umbrella, when the thief  
12 turns to take down a backpack from a display. I've seen Sydney's profile a number of times in  
13 the last six months, and the profile I saw was remarkably similar. The nose, the chin, the  
14 forehead – it was all the same. Of course, no one can make a positive identification off a view  
15 like that, but I was pretty sure and told Detective Gerard that night.

16  
17 Naturally, the detective wanted the recording preserved and I told Thornhill to take care  
18 of it. When the police came back to collect the video evidence on August 28, I discovered that  
19 Kahuna had forgotten to notify security and all the footage from that night had all been written  
20 over. That was the last straw in a bale of incompetence, and I fired Kahuna on the spot. No, I  
21 haven't looked at the website that slacker is now curating, but I've been told what is on it and it  
22 is all a pack of fantasies and lies.

23  
24 Even though I wish it wasn't true, I know that the defendant was responsible for taking  
25 Cash's pocketbook. Sydney was the only member of my management team who was  
26 significantly shorter than the security stanchions. The person who pulled this job had the keys  
27 and intimate knowledge of the store, its offices and its cameras. And the thief used Carden's  
28 secret alarm code. I really wanted to confront Sydney that night, but no one could reach the  
29 defendant by phone. And when Sydney's next shift rolled around three days later, guess what?  
30 The defendant didn't show up for work or call in sick. The police gave Sydney's keys back to me  
31 and I had to issue new alarm codes to everyone on the management team.

1 STATEMENT OF PAYTON BAILEE

2  
3 Good morning! My name is Payton Bailee, customer relations specialist with the South  
4 Central branch of the Sunshine Federal Credit Union. We don't really use the term bank teller  
5 anymore – but you may if you like. How can I assist you in understanding the events of August  
6 24, 2019?  
7

8 First, let me tell you a little bit about myself. I've only been in the financial industry for a  
9 few years, but I'm already a senior specialist here at Sunshine. Actually, this is my first full-time  
10 job after I graduated from high school and received my Teller Training Certificate (I don't why  
11 the school still uses that antiquated term) from Alki Community College. I started out working  
12 only a few days a week on a part-time basis. Other specialists have come and gone, but I'm still  
13 here and my senior status means longer shifts, some benefits and supervisory authority over  
14 two other employees.  
15

16 Here at Sunshine CU, we want to "see you in the Sunshine". With all of the magical ways  
17 to bank on-line and by smartphone these days, why waste your time coming directly into a  
18 stuffy old lobby and waiting for a place at the counter? We encourage you to use our state-of  
19 the-art technology and very secure website to "bank on the go and avoid the slow." Most of  
20 our customers follow that advice and I rarely get a chance to interact with them after initial  
21 account setup. In fact, some of them set up their accounts on line and I never lay eyes on them.  
22

23 However, some folks just aren't comfortable changing with the times and using those  
24 handy electronic devices. And that's okay – we want our customers to be happy! So here at  
25 South Central Sunshine, we have several ways to accomplish your in-branch banking, and most  
26 of them don't even involve any additional fee. Of course, you can always walk in and join the  
27 crowd that likes to deal with a CR specialist face to face. That's my favorite type of banking too  
28 – chatting with you about your day, punching in a few numbers and giving you a paper receipt  
29 or a few bills. You can even have a cookie and some coffee while you wait.  
30

31 For those customers who don't want to climb out of their cars, we have two drive-up  
32 stations, where you can request withdrawals and make deposits through pneumatic tubes.  
33 One of us will communicate with you through an intercom system and make sure we know  
34 exactly what you need to accomplish. This may take a little longer, since there is usually only  
35 one specialist on duty at a time, but I promise we will get with you just as soon as we can.  
36

37 Finally, if a customer just wants to withdraw some cash or deposit a few checks, he or  
38 she can use the automated teller machine in the lobby. The ATM serves both our credit union

1 and several other financial institutions, so that makes for convenient remote banking with  
2 several accounts at a time. And if the ATM runs out of money, don't worry – just let me know  
3 and I'll replenish it as soon as I finish with my in-person and drive-in customers.  
4

5 Things can get pretty hectic down here, with three different ways for customers to need  
6 assistance from a single specialist. The ATM should require the least human interaction, but  
7 that is not always the case. Lots of things can go wrong with that contraption – paper jams in  
8 the receipt printer, accidental unplugs, oily finger build-up on the touchscreen. Some  
9 customers think it's a pinball machine and whack it when it doesn't perform to their  
10 expectations. Then –TILT! Finally, depending on the volume of use, the cash receptacle may  
11 need to be refilled several times a day. Sometimes, a rover for all of our branches comes  
12 around and does this as a matter of routine. But if it runs out between the rover's visits, then  
13 that is another one of the many duties of a CR specialist.  
14

15 The main counter in our branch is on the west side of the building, right next to the  
16 window that looks out onto the drive-through stations. The safe is behind the south end of this  
17 counter, at the end of a row of three payout windows that are configured for safe interaction  
18 with our customers and their funds. A specialist can come out into the lobby from behind the  
19 counter through a secure door on the north end. But you can't get back in behind the counter  
20 without the secret code. The lobby has marked waiting lines for each payout window (cartoon  
21 feet on the floor), some chairs near the coffee/cookie table and a waiting area for the ATM,  
22 which is against the eastern wall. I'd estimate the machine is about 12 feet from the payout  
23 windows, although I've never had any reason to measure it.  
24

25 It could get cramped behind that counter if all three of the payout windows were in use  
26 at the same time. Luckily, Sunshine has downsized its workforce over the years, as it nudges its  
27 customers to bank electronically. So usually there is only one CR specialist on duty at a time, to  
28 handle the counter, cover the drive-through window and maintain the lobby and the ATM.  
29 Overcrowding behind the counter is never a concern.  
30

31 I worked by myself all day on August 24. Our regular hours are from 9 am to 5 pm,  
32 although we routinely close for an hour at noon, so whoever is there can get some lunch. I  
33 sometimes skip lunch, even though that is against company policy. Since so many customers  
34 think credit unions should be open during lunch, closing just results in a big, grumpy line at  
35 1pm. When I stay open, I snack on the cookies (also a company no-no) and drink lots of coffee.  
36 It sure makes you look forward to dinnertime.  
37

1 That was a busy Saturday, for sure and I kept the CU open through lunch. There was a  
2 steady stream of customers at all our banking modalities, including the ATM. That crazy thing  
3 had been malfunctioning all week, ever since the rover removed a skimmer device someone  
4 had snuck into the card slot a few days before. Even though maintenance gave it the once over  
5 on Tuesday or Wednesday, there were more receipt jams and error codes than usual. And  
6 security still hadn't repaired the ATM's internal camera, which is supposed to take a picture of  
7 every client involved in a transaction. I guess they figured the sign advising people that they  
8 were on camera was enough of a deterrent, like when you buy a Beware of Dog sign even  
9 though you don't own a dog.

10  
11 On a day like Saturday, I wouldn't normally notice any particular customer at the ATM,  
12 but one did draw my attention on August 24. This client was in three times, and the visits were  
13 spaced about two hours apart. That isn't unusual, but each time I had to remind the customer  
14 to "lower the hood". For security reasons, we require our clients not to wear masks, hoods or  
15 any items that obscure their faces while inside the building. One reminder per customer is  
16 enough most of the time. This customer was wearing a hooded sweatshirt and each time I had  
17 to call out to him or her – I wasn't sure which at first – asking to take down the hood. Each time  
18 the hood came down, but I noticed the customer was wearing a stocking cap under the hood.  
19 Since the cap didn't obscure the face, I let it go. The customer turned from me and looked  
20 away from both the counter and the ATM during each withdrawal.

21  
22 All of this ATM user's transactions were withdrawals from one of our accounts, as  
23 shown by the printout I provided to the police, and that I recognize as Exhibit 3. A lot of cash  
24 came out each time. Our settings allow you to withdraw up to \$4000 at a time, but that almost  
25 never happens. Each time this customer was finished with a withdrawal, I had to refill the cash  
26 receptacle within a few minutes. Odd, I thought, but the machine hadn't sounded any security  
27 alerts or displayed any error codes, so I went on about my business.

28  
29 The third transaction created more concern, which was just a little irritating because I  
30 was backed up both at the counter and the drive-through. After complying with my third  
31 request to drop the hood, the customer complained that the ATM would not return a debit  
32 card. That was the third time this shift that particular jam had happened and I was getting  
33 ready to unplug the machine and call for maintenance. However, I went over and turned a  
34 special key in the side of the card reader, which almost always works to make the card come  
35 out. After a few seconds a striped card, which didn't look like our standard issue, popped loose  
36 from the slot. The customer took the cash out of the bin and headed for the door. As if on cue,  
37 the ATM asked for a currency refill. I yanked its cord out of the wall and told the next person in  
38 line that I would need to help them at the counter.

1  
2           During this third transaction, I was beside the ATM user for 15-20 seconds. I had a good  
3 opportunity to observe facial features, were rather drawn and nervous. The customer kept  
4 looking away from me and the ATM, so my view was mainly of the side. But I can say without a  
5 doubt in mind that the person at the ATM on August 24 was the defendant, Sydney Carden.  
6 I've been told that Carden is a customer at our North Central branch and has used our ATM and  
7 drive-through stations in the past – we keep records of each type of use -- but I do not recall  
8 ever seeing the defendant before that day.  
9

10           On August 29, Detective Gerard asked me about the incident and told me why it was  
11 important. Unfortunately, the counter cameras did not pick up a good view of Carden. The  
12 officer had several pictures in a folder and told me I was going to view them “to see if you can  
13 pick out the suspect.” When the folder was opened, the defendant’s photograph was the first  
14 one visible. I said, “You don’t have to show me anything else – that’s the person with the hood  
15 at the ATM.” Gerard said, “Are you sure? You know the suspect may not even be in these  
16 photos”. I looked again and I was definite: “That’s your thief, no doubt in my mind.” I’m just  
17 glad I was able to help resolve this for Carey Cash, who apparently also uses the ATM here on a  
18 regular basis, although I don’t recall seeing that name or that person before this incident.

1 STATEMENT OF DETECTIVE RAZ GERARD

2  
3 My name is Raz Gerard and I am a detective with the Alki City Police Department. I am  
4 currently assigned to the department's property crimes division and I am the only detective in  
5 our newly created electronic crimes subdivision. With the growth of criminal activity and fraud  
6 on the internet, however, I shouldn't be alone in this unit for long.  
7

8 I am the lead investigator in this case and an expert in the methods criminals use to  
9 steal the identities of ordinary citizens. This stolen information is used to obtain billions of  
10 dollars each year from bank accounts, credit card companies, private firms and government  
11 agencies at all levels. The area of crime detection is constantly evolving – as soon as tech  
12 companies fill one of the cracks used to breach a computer system, the crooks find another.  
13

14 I am a commissioned law enforcement officer in the State of Washington and have been  
15 employed by the Alki City Police Department for more than four years. Prior to working for  
16 ACPD, I was a property crimes investigator with the Fir County Sheriff's Department, and  
17 performed basically the same duties I have now. In addition to completing the basic law  
18 enforcement academy, I have taken a number of general refresher courses over the years.  
19

20 My most valuable experience, however, comes from the private sector. After high  
21 school, I spent over ten years working for several tech firms, who hired me as an ethical hacker.  
22 As a kid, I was always fascinated with computers and the exotic places you could travel to on  
23 the web. Like too many young people, I fell in with some folks who convinced me that it was  
24 fun to break in to company data bases, just to see what we could find. During the intrusion, we  
25 would leave some calling card, like a crude picture, so everyone would know we were there. To  
26 finance new equipment and software for our activities, some of my hacker friends would take  
27 what they found and sell it on the "dark web" where others would use the information to steal  
28 from and exploit the company. I didn't personally do this, but I'm ashamed to say that I did  
29 cheerlead, praising some of my group who engaged in these activities.  
30

31 Fortunately, I got away from that gang and decided to use my knowledge to assist  
32 companies, and for my own financial benefit. So what is ethical hacking? Simply put, this type  
33 of hacking is performed by a company or individual to help identify potential threats on a  
34 computer or network. An ethical hacker attempts to bypass system security and search for any  
35 weak points that could be exploited by the malicious hackers. This information is then used by  
36 the organization to improve the system security, to minimize or eliminate any potential attacks.  
37

1 For hacking to be deemed ethical, the hacker must have express permission from a  
2 company to probe their network, preferably in writing. You have to respect individual and  
3 company privacy, no matter what you find (you'd be surprised what people do on company  
4 computers). And you have to close out your work and immediately report vulnerabilities that  
5 you find, so you and others cannot exploit them later.

6  
7 Although most of my skills in this area are the result of self-study, practice and innate  
8 talent, I have attended numerous courses and seminars to keep up with the latest software and  
9 technology. At first, these courses were part of the renewal of my license as a Certified Ethical  
10 Hacker (yes, it is a real thing). Later courses offered through the police academy included  
11 courses in Fraud Ethics and Case Study training, Online Investigations with an emphasis on  
12 Craigslist and Elder Fraud and Exploitation Recognition. All of these courses allow me to  
13 maintain a current certification as a Fraud Investigator. Finally, in my work as an officer, I have  
14 actually investigated thousands of suspected fraud and theft cases, many of them involving  
15 electronic exploitation.

16  
17 Why did I leave the private sector for a career in law enforcement? I wanted to do more  
18 than make money plugging holes in the leaky security systems of big corporations. I could see  
19 that these crimes were having a huge impact on real people, ruining their credit and draining  
20 their resources. I wanted to help those victims and to bring these shadowy criminals to justice.  
21 In the electronic crimes unit, my primary role is to investigate fraud through banking, loan,  
22 credit card and money transfers.

23  
24 I use a variety of electronic media to assist in tracking down suspects, including social  
25 media, bank and retail surveillance cameras, credit card transactions, bank statements, email  
26 and account information. My work often requires me to cooperate with other jurisdictions and  
27 companies throughout the country and the world. The evidence associated with these frauds  
28 and thefts is not held in paper form in one location – it covers many different jurisdictions and  
29 the transactions are often purposely routed through multiple computers, in an effort to cover  
30 the perpetrator's tracks.

31  
32 Let me give you a couple of examples of how identity thieves can misuse financial  
33 information. A common scheme is to identify an active credit card number belonging to an  
34 unsuspecting victim. The suspect will then encode the number on the magnetic strip of a  
35 generic gift card. The newly encoded gift card is used like a credit card, to purchase  
36 merchandise or more gift cards, since store clerks usually don't examine cards that closely.  
37 Purchased gift cards are first used to buy real things and are often subsequently encoded with  
38 stolen credit or debit information. In this way, multiple purchases can be made at numerous  
39 locations before the account is finally shut down after the illegal activity is reported.

40  
41 A thief does not need the original credit card to pull off this kind of crime, although that  
42 is the easiest and quickest way to get the information. All you need is the number, which can  
43 be purchased on the dark web from anonymous crooks who obtain these numbers through a  
44 variety of methods. Some suspects use the first 12 digits of a valid stolen credit card and then

1 guess different combinations of the last four numbers in order to find another valid card  
2 number to perpetuate their scheme.

3  
4 Another common technique to obtain information is phishing. The Federal Trade  
5 Commission defines phishing as “a scammer uses fraudulent emails or texts, or copycat  
6 websites to get you to share personal information – such as account numbers, Social Security  
7 numbers, or your login IDs and passwords. Phishing scammers lure their targets into a false  
8 sense of security by spoofing the familiar, trusted logos of established, legitimate companies.  
9 Or they pretend to be a friend or family member.”

10  
11 Finally, skimmer devices can be installed in gas pumps, ATMs and retail bank card  
12 readers. After the skimmer is installed, a victim will swipe his or her bank card and the device  
13 will read and retain the number from the card’s magnetic strip. The devices are periodically  
14 removed and the numbers are downloaded to a laptop. Actually, newer skimmers use  
15 Bluetooth technology, so the data can be retrieved without removing the device.

16  
17 Debit card numbers are harder to use, because you need identifying information or a  
18 passcode. Unfortunately, victims often write down this information and store it with the debit  
19 card, or use easily guessed passcode information. In this case, for example, Cash wrote down  
20 all the information someone would need to exploit the stolen Sunshine FCU debit card and left  
21 this information in the pocketbook. That’s the kind of thing that makes me grind my teeth.

22  
23 Because my division investigates routine property crimes like burglaries, I often get  
24 called out to assist with these types of cases. On August 23, 2019, at about 3:35 am, I was  
25 dispatched with other officers to a cold burglary at the LivGud4Less, located in the shopping  
26 center at the intersection of Highway 990 and Tajana Drive. Initially, nothing suggested that  
27 this crime would involve identity theft or fraud. The only item listed as missing by the store’s  
28 manager was a bundle of United States currency from the office safe, in the amount of \$480. A  
29 backpack and umbrella had been moved during the crime, but were still in the store when we  
30 arrived.

31  
32 After talking to the store’s manager and assistant manager, and viewing the video  
33 footage of the event, it was clear to me that this was an inside job. Because of the failure of the  
34 employees of the store to preserve the video, it is not available for the jury to view.  
35 Fortunately, I watched parts of the recordings several times that night and took notes, including  
36 times and specific cameras where the suspect was observed. I planned to use these notes to  
37 find things on the preserved recordings later on, but these notes refresh my recollection of  
38 what I observed.

39  
40 The entire break-in took 12 minutes from entry to exit and the suspect obviously had  
41 intimate knowledge of the store’s layout. The exterior cameras show the perpetrator using a  
42 key to unlock the front doors and I confirmed that there was no sign of forced entry or damage  
43 to this door. The suspect then moves directly to the alarm panel in the foyer and spends about

1 a minute fumbling around there. After punching at the panel's keyboard a few times,, the lights  
2 suddenly come on in the foyer and the second set of doors automatically slides open.

3  
4 The suspect walks through the security stanchions immediately adjacent to the front  
5 door. These are the devices that sound an alarm if someone attempts to walk out with an item  
6 that has an attached security tag. While we were watching the video together, the manager  
7 pointed out that the suspect was a "runt – way shorter than the stanchions." I could see that  
8 this was true, although it took me a couple of viewings to notice the gap between the  
9 stanchions and the hood on the suspect's head. But it was definitely there, a couple of inches  
10 difference.

11  
12 During all of the recorded events, the suspect is making an effort to keep his or her face  
13 away from the camera. This indicates that each camera location and angle is known to the  
14 perpetrator. Next, the suspect walks to the left, around a panel and through a couple of short  
15 aisles to reach a free-standing rack of umbrellas, which are not visible from the front door. The  
16 suspect selects and opens an umbrella and uses the umbrella through the rest of the event to  
17 obscure the head and upper portions of the body from view.

18  
19 The perp then walks to the back of the store, selects a backpack from a display and  
20 moves directly toward the store's offices. Still obscured by the umbrella, he or she then uses a  
21 key to open the cashier's room. Once inside, I assume the same key is used to unlock the  
22 interior office – I can't say that positively, because the umbrella blocked my view. Once inside  
23 the second office, the safe box is opened somehow – again, out of my sight – and then left  
24 empty on the office floor. The thief abandons the backpack – apparently, he or she was hoping  
25 for a bigger haul. Whatever was taken must have been concealed in the front or pockets of the  
26 hooded sweatshirt the suspect was wearing, because I couldn't see anything being carried in  
27 the bare hands visible at several points in the videos.

28  
29 The suspect exits the offices and leaves the store through the emergency doors in the  
30 back. The umbrella gets stuck in the door, so this is the only time the face is exposed, but only  
31 for a split second. The thief breaks into a dead run and is out into the dark and away from the  
32 camera almost immediately.

33  
34 I took a couple of still screen shots from the videos that night, but they were so blurry  
35 and pixelated that they were worthless. One of them is Exhibit 6, entered into evidence for the  
36 defense. But that photo is deceptive, because it appears to that the suspect is taller than the  
37 security stanchion. However, in my opinion that is the result of their relative positions – at  
38 better camera angles the height difference was clearly visible. I also took the photograph of the  
39 umbrella, Exhibit 4. I did not check for fingerprints or DNA on the umbrella, or anything else,  
40 because this was an inside job. You would expect to find employee fingerprints and DNA  
41 everywhere.

42  
43 Drucker provided me with a list of store personnel with alarm codes and access keys.  
44 Sam advised me that the Sydney Carden was the only person in that group who was shorter

1 than the stanchions and the manager also stated that the defendant had been absent from  
2 work a lot and had mentioned some financial difficulties to the others. Carden was not present  
3 at the time, so I took statements and measurements of the managers who were present –  
4 Drucker, Kahuna Thornhill and Chas Darney – and cleared the scene.  
5

6 I contacted the security company and obtained the electronic record of the activation  
7 and deactivation of the store alarm system on August 21-23, 2019. That record is Exhibit 2, and  
8 shows the codes for each member of the management team. The alarm was activated that  
9 night at store closing by Kahuna Thornhill. It was deactivated at 2:28 am by someone who  
10 entered invalid codes on two occasions. These codes were both off by one number from the  
11 code that eventually deactivated the alarm, which was assigned to Sydney Carden. I guess the  
12 defendant was nervous while entering the store.  
13

14 On the morning of August 25, the store's manager advised me that Carey Cash's  
15 pocketbook and financial information was also in the safe and had been taken during the break-  
16 in. I immediately tried to contact Cash, but was unable to reach the victim until late afternoon  
17 on August 26. I advised Cash to immediately contact all of the credit card companies and banks  
18 involved. Unfortunately, the financial information in the pocketbook had already been used to  
19 make multiple credit card purchases at various on-line sites and in several local stores and  
20 restaurants. The use of the information for local purchases, in my opinion, points to the  
21 original thief rather than a purchaser from the dark web. None of the stores had security  
22 cameras that captured the transaction, and I assume that the thief's knowledge of Cash's  
23 personal information would make the transactions routine. The total bill for all of these credit  
24 card transactions was \$7,558.43.  
25

26 I had better luck with the victim's debit card, which was used at an ATM within 4 miles  
27 of the defendant's home to drain Cash's bank account. The money was taken on three separate  
28 occasions on the same day, for a grand total of \$12,000. Immediate use and access to the  
29 password again points to the original thief as the ATM use, and away from a re-purchaser of the  
30 information. The on-duty teller, Payton Bailee, remembered the person who made the  
31 transactions, because that person foolishly asked for assistance on the last occasion. Bailee had  
32 a hard time describing the suspect, except for the clothing. I showed Bailee a photograph that I  
33 had obtained of the defendant. I was going to show the witness pictures of all the store  
34 managers in a laydown, but Bailee immediately stated that Carden was the person at the ATM  
35 machine that day and was very sure in the identification. So I didn't see the need to keep going  
36 through the other photographs.  
37

38 After a week of trying to reach Sydney Carden, I finally went to the defendant's  
39 apartment. Carden was very upset about something – teary eyed, face red, that sort of thing.  
40 The defendant denied any involvement in the burglary or theft, but admitted to paying off a lot  
41 of bills with cash in the week following the crime, totaling over \$10,000. The explanation was a  
42 sudden infusion of cash from slot machine winnings. How convenient - a one-armed bandit  
43 spits out the cash needed to pay all your bills. I placed the defendant under arrest and turned  
44 the matter over to the Pine County prosecutor's office for felony charges.

1 STATEMENT OF SYDNEY CARDEN

2  
3 After twenty years in retail management, I cannot believe that my reputation and  
4 livelihood have been ruined by LivGud4Less and the Pine County Prosecutor. Despite my  
5 extensive education and experience in this field, no one will hire me to any position that  
6 requires trust or the handling of financial information. Currently, I work as a telephone solicitor  
7 for a local non-profit organization, raising money for struggling widows and orphans. Even in  
8 this job, I am not allowed to actually take financial information over the phone – I have to  
9 transfer the donor to another person. Still, it is important work for the community, a far, far  
10 better job to hold than I have ever held before – at a far, far lesser rate of pay.

11  
12 I certainly didn't expect to be in this position when I graduated from Mid-Central  
13 Washington Regional College with a Bachelor's degree in Business Administration. I worked  
14 summer jobs and interned at various retail stores in the area and so I had several connections  
15 to the business community when I finished my education. I was immediately hired as an  
16 associate manager for a big-box electronics store in Yakima and quickly moved up the ladder to  
17 manager and regional director for that company.

18  
19 Throughout the years, my willingness to accept new challenges and to move around has  
20 led me to a number of positions in retail management, with most of the big chains you could  
21 name. At first, I was always advancing, taking positions with more and more responsibility.  
22 Unfortunately, and through no fault of my own, those opportunities began to disappear as  
23 these chains downsized their physical stores or completely collapsed. More and more people  
24 were competing with me for the same scarce jobs. I had to accept lesser positions in my field,  
25 even though I was clearly overqualified for some of the work. It was frustrating for someone  
26 with my experience and I have been contemplating returning to school, to get some training in  
27 the digital sales world. I don't know much about that part of our industry -- anyone will tell you  
28 that I am bad with computers.

29  
30 My last job in retail was a low point, because I was basically forced to return to the same  
31 position level that I had coming out of college. In March, 2019, I was hired as the assistant  
32 store manager for LivGud4Less in Alki City. I had managed an LGL earlier in my career, but I left  
33 the company for a decidedly more progressive and responsible position. Still, I hadn't worked  
34 for several months and my unemployment was running out, so I was grateful when Sam  
35 Drucker decided to take me on.

36  
37 Gratitude only goes so far. I quickly discovered that working at LGL was not very "Gud,"  
38 exactly what I remembered from my last stint with the company. For one thing, the chain is

1 constantly looking for the cheapest way to do things, even if the customers are left hanging.  
2 That is not the way I want to do treat people and I tried to let corporate know that this  
3 approach is counterproductive in the long run.  
4

5 In addition, LGL is constantly downsizing and all of the employees are stressed by the  
6 idea of losing their jobs. Sam's appearance as manager apparently didn't help, because the  
7 other two stores Sam had managed closed quickly. Sam has a lot less managerial experience  
8 than I do and had never managed a store for more than a year at a time. I tried to make  
9 suggestions for improvements and ways to increase customer and employee satisfaction, but I  
10 think Sam resented an underling trying to lead, however good an idea that would have been.  
11

12 Morale was low throughout the employee base and that was reflected in the lax way  
13 folks did their jobs. Shoplifting was a continual problem and yet no one seemed interested in  
14 improving security or watching the aisles. Sam did institute some rigorous requirements for  
15 auditing the cash registers, which did improve the balance rate on the tills at the end of the  
16 day. Otherwise, I guess Sam really trusted the employees, because everyone seemed to know  
17 the alarm codes, or could figure them out by a couple of guesses based on Sam's birthday.  
18

19 After a couple of months on the job, the stress really started to get to me. I had always  
20 been periodically plagued by migraine headaches, but they started to become more frequent as  
21 the pressures of the job worsened. I would be laid up for a morning, sometimes longer, and I  
22 could not predict when these headaches would occur. Sam kept lecturing me about the need  
23 to be punctual and not let the team down, but that just made things worse. I tried to explain  
24 that stress only aggravated the problem, so laying a guilt trip on me would not help. We went  
25 over this issue several times, but Sam never seemed to get the point.  
26

27 I soldiered on as best I could, and things weren't bad every day. The management team  
28 – Sam, Kahuna, Chas and I – would sometimes meet after work and commiserate together at a  
29 local watering hole. By the way, I admit that I am the shortest of that group, but not by that  
30 much. I would say Chas is probably the closest to me in height – we are very similar in  
31 appearance – but none of us is scraping the ceiling.  
32

33 We all had similar problems – less money than we used to be able to earn, more bills,  
34 higher rent. I had been drawing on my savings to cover expenses for several months and my  
35 landlord was bugging me to get current or else. She didn't really want to evict me from my  
36 apartment, but she said she couldn't hold the property owner off much longer.  
37

1 I should say that all of this was nothing new. Retail goes up and down with the general  
2 economy. I have been out of work and on short wages before. Despite that, my reputation for  
3 honesty and fair dealing at work has never been questioned. I have never been discharged  
4 from a job for impropriety and I have received employee or manager of the month at several  
5 companies, including in June 2019 at LivGud4Less. And my record is spotless, not even a  
6 traffic ticket or an arrest.

7  
8 The first part of the summer was a real challenge at work. I was asked to do an  
9 extensive report on the adequacy of the camera placements in the building, on top of my  
10 regular duties. Then all of my recommendations were promptly ignored. Drucker didn't agree  
11 with hiding the cameras behind some of the black panels that were already there, while leaving  
12 others blank. Instead, Sam wanted the cameras to be more visible, reasoning that their obvious  
13 presence was more of a deterrent to shoplifters than whether they actually worked! So several  
14 weeks of my time was basically wasted for nothing.

15  
16 The only bright spot during this period was my new significant other, Frankie Baker. We  
17 had a lot of good times at first, which took some of the sting out of my nowhere job and my  
18 mounting bills. Looking back now, I can see that Frankie was a big part of those bills, but that  
19 didn't concern me at the time. Although I really did have headaches, I'll admit that Frankie  
20 convinced me to play hooky on a few occasions.

21  
22 Although I occasionally did closing, my primary duties in August were to open the store  
23 and run things until Sam and the afternoon crew arrived. I would get there before everyone  
24 else, unlock the door and disable the alarm. Then I would go to the auditor's room and unlock  
25 the safe, or just open the box if it had been left on the default combination. I recommended  
26 several times that this combination, and other numerical codes, be reset periodically. Of  
27 course, those suggestions were also ignored.

28  
29 As each cashier came in, I would hand them a till with the seed money, after counting it  
30 out in front of the employee. Once the store was open at 8:00 am, I would monitor the floor  
31 employees, assist with purchaser problems and check with security if there was a concern that  
32 someone was shoplifting. Sam would usually wander in around 11 am and either Kahuna or  
33 Chas would relieve me around 2-3 pm.

34  
35 Nothing unusual happened on the morning of August 22nd. I was dealing with a return  
36 and getting ready to handle the end of shift audit and rounds when Sam called me into the  
37 office. Drucker proceeded to read me the riot act again about daring to have a headache on  
38 company time and leaving work early a couple of days before. Because I was getting tired of

1 explaining the same thing over and over, I just listened this time and was thankful when Kahuna  
2 came in to provide a distraction. The two of them got into it about Kahuna's tardiness and  
3 some other issues which apparently had been simmering between them. On the way out to  
4 start the end of shift rounds, Kahuna threw a pocketbook on the desk and said something like,  
5 "Here, I found this."

6  
7 And what a find! I couldn't believe that Carey Cash had been in the store and I had  
8 somehow missed it. I'm one of Carey's biggest fans and have watched, listened to and read  
9 everything in Cash Universe. I could hardly control myself as I watched Drucker inventory the  
10 pocketbook. I remember a picture of Carey and his ferrets, several cards and a wad of cash,  
11 which turned out to be one twenty dollar bill wrapped around a bunch of ones.

12  
13 Following the inventory, I caught up with Kahuna and completed the end of shift  
14 rounds. I asked Thornhill to show me where the wallet was found, so I could see whether the  
15 cameras would have picked up Carey's visit. Unfortunately, Kahuna was a little vague on the  
16 exact details, pointing at an area out in the parking lot.

17  
18 After I finished my shift that Thursday I went home, glad that I did not have to be back  
19 at work until Tuesday evening. The other assistant manager, Darnay, had asked to cover some  
20 extra shifts, since Chas was in pretty desperate financial straits at the time. When I arrived at  
21 home, I was greeted by a new eviction notice on my door, demanding full payment of about  
22 \$5000 in back rent by Monday – or else. That was a bummer, but she wasn't in the office when  
23 I went down to talk to her. So I puttered around my apartment the rest of the day and went to  
24 bed early with a headache.

25  
26 Early Saturday evening, Frankie showed up on my doorstep and wanted to head out on  
27 a spontaneous trip to the big gaming casino and hotel that just opened, about two hours  
28 driving time from my apartment. Frankie said the whole thing was arranged and it wouldn't  
29 cost me a dime. So I didn't ask any questions, just threw a few things in a bag and hopped into  
30 the MuvR Frankie had hired. We spent the next couple of days watching the shows, eating  
31 buffet and in Frankie's case, gambling. Since I didn't have money for my rent, I didn't think it  
32 was right that I would gamble, so I didn't even sign up for a player's card.

33  
34 Wouldn't you know, Baker hit it big – a \$25,000 jackpot on a progressive slot machine.  
35 Frankie gave me half, I guess expecting that I would jump in on the gambling binge. No way – I  
36 put that money away and it came home with me, even though most of Frankie's share did not.  
37 As soon as I got back, I paid my landlord in full, paid down my credit card bills and had about  
38 \$3,000 left over. I was so excited that I decided that this was a sign, proof that things were

1 turning around for me. So I did a stupid thing, the type of impulsive decision I have never made  
2 before. I decided to ghost my job – just quit and not come back, disappear from that bad scene  
3 and look for something new. I didn't show up for or call into work on Tuesday or Wednesday  
4 and left my phone turned off so that I wouldn't have to hear Drucker's lectures on  
5 responsibility.

6  
7 Frankie came over Wednesday night and what a change, now that the big jackpot was  
8 gone. Baker was mad that I had kept the money instead of reinvesting it in the slots. We had a  
9 huge fight and then that louse grabbed the rest of the money out of my hand and disappeared.  
10 I haven't seen Frankie or the cash since that time and my lawyers haven't been able to find that  
11 ferret to corroborate my story. Since the trip and the gambling proceeds were all in Baker's  
12 name, there is nothing in writing to show the source of the money. But that is exactly what  
13 happened.

14  
15 By Thursday, I had decided that the best thing to do was to head down to LGL and beg  
16 Drucker for my job back. I was pretty angry and upset about the idea. Before I got the chance,  
17 however, Detective Gerard came to my apartment and arrested me. That police contact was  
18 my first inkling that something had been stolen from the store or that I was suspected of being  
19 involved.

20  
21 I am innocent of these charges. I did not enter the LGL on August 23rd and I did not  
22 steal anything. Just one look at Exhibit 6 will show you that someone who appears to be much  
23 taller than I am actually entered the store. I was not at the Sunshine Federal Credit Union that  
24 Saturday, no matter what Payton Bailee says. I would never, ever do something like this –  
25 especially not to Carey!

1 STATEMENT OF PROFESSOR SAGE LOFFTISS

2  
3 Thank you for giving me the opportunity to return to the beautiful Pacific Northwest to  
4 provide this statement, and to give testimony in this important case. My name is Sage Lofftiss  
5 and I am a professor of psychology at Sand Desert University in southeastern California. I have  
6 been an instructor and researcher at SDU since 2013, where I specialize in social psychology.  
7 This professorship is my first tenured position, which I accepted immediately after the  
8 completion of my doctorate in general psychology at Washington Technical University. While  
9 at Wash Tech, I had the honor of serving as an intern and teaching assistant with Dr. Wesleyan  
10 Roberts, an acknowledged leader in the study of the psychological effects of various stimuli on  
11 memory and eyewitness identification. I also obtained my undergraduate degree, in the related  
12 field of sociology, from that prestigious university.

13  
14 Social psychology is a specialized field of psychology that focuses on how people  
15 perceive and interpret one another's behavior in actual social interactions of various types.  
16 Research in this area relies upon both field studies of recurring events and experiments with  
17 human subjects, who are subjected to various stimuli and then tested in different ways to  
18 measure any effects on, among other things, their ability to perceive and recall events. Like my  
19 mentor, my research focus is on the accuracy of eyewitness testimony and how a person's  
20 memory and ability to observe can be enhanced or corrupted by known factors.

21  
22 I have testified as an expert witness in 40 cases in seven western states, including  
23 Washington. The subject has always been eyewitness identification and I was a witness for the  
24 defendant in all but one of those cases. I have also provided sworn affidavits about general  
25 principles of misidentification in support of numerous personal restraint petitions, where a  
26 defendant is challenging a wrongful conviction based on improper eyewitness testimony.  
27 These affidavits are always given for defendants, for obvious reasons – prosecutors rarely  
28 challenge wrongful convictions.

29  
30 My fees for services in cases of this type are set by and paid to my employer, SDU. The  
31 charges include \$500 per hour for consultation and preparation and \$750 per hour for trial  
32 testimony, plus travel and other expenses. The funds are used by the university to support the  
33 psychology department and its activities, including my research projects.

34  
35 Testimony of this type is necessary because jurors often attribute a great deal of weight  
36 to eyewitness identification evidence, despite numerous studies that have demonstrated that it  
37 can be notoriously unreliable when certain factors are present. The consequences of this  
38 reliance can be devastating, with an untold number of wrongful convictions, ruined lives and

1 separated families. Of the 333 post-conviction DNA exonerations in the United States through  
2 2015, more than 70% of them involved eyewitness misidentification. According to the  
3 Innocence Project, inaccurate eyewitness testimony accounts for more wrongful convictions  
4 than false confessions, problems with informants and defective or fraudulent science  
5 combined. And these are just the known cases of wrongful conviction; other instances of  
6 injustice may never come to light.

7  
8 Eyewitnesses are rarely lying when they testify that they are sure that a defendant is the  
9 person they saw committing a crime. And sometimes they are correct; studies do show that  
10 humans can accurately perceive others with a high degree of reliability, given the right  
11 circumstances. But too often these witnesses (and the juries they testify before) are unaware  
12 of the factors that can result in a mistaken identification.

13  
14 Eyewitness identification can be broken down into three discreet processes: (1)  
15 acquisition of a memory, by perceiving an event while it is happening; (2) retaining the details  
16 of the event in one's mind; and (3) retrieving that memory in an uncorrupted form when asked  
17 to recall it at a later time. Different factors can affect each of these processes and a  
18 combination of factors can work against retaining an accurate memory of something as subtle  
19 as the distinctive characteristics of a human face.

20  
21 Many people assume that memory works like a video recording device. The mind  
22 records everything that goes on around us and these memories remain fixed in our brain until  
23 we pull them back out. But everyone knows that we do not acquire a memory of all the many  
24 stimuli that bombard us every day. Acquisition problems arise from perceptual selectivity,  
25 stress and the conditions of the observation. The proportion of information around us that is  
26 actually perceived is very small. The details of a crime may completely bypass the perception  
27 of a witness, particularly if he or she is unaware that the event is significant and will need to be  
28 recalled later on.

29  
30 In general, the longer we have the ability to perceive something, the better we are able  
31 to recall its details later. Subjects who are shown a photograph of a human face for 20 seconds  
32 are better able to recall details of the face than subjects who are only allowed to view the  
33 photograph for 5 seconds. However, presentation of the need for attention is also important.  
34 A group told to really pay attention to the face in a picture will be more likely to recall  
35 accurately than a group told to study other parts of the picture, or not given any instructions  
36 about what is important. The face-attentive group will have better recall even if provided a  
37 significantly smaller viewing window than the other test subjects.

1 In this case, for example, Payton Bailee appears to have had no reason to pay particular  
2 attention to the face of the ATM customer observed on August 24. The bank teller helped  
3 numerous customers that day, and the need to remember a particular person involved in a  
4 routine withdrawal (at least, routine as perceived) would diminish the likelihood that particular  
5 details should be perceived or retained. Bailee did have an opportunity to view the person on  
6 several occasions, but the facial features were not prominently displayed during most of that  
7 time.

8  
9 Another environmental factor that can either improve or inhibit perception is stress.  
10 According to the American Psychological Association, stress is “the pattern of specific and  
11 nonspecific responses an organism makes to stimulus events that disturb its equilibrium and tax  
12 or exceed its ability to cope.” Stress is a mental or physical reaction to a stimulus, a form of  
13 being aroused by the things we perceive. Stress is a vague, broad term in psychology because  
14 something that causes a reaction in one person may not evoke a similar, or any, reaction in  
15 someone else.

16  
17 Generally, research shows that small amounts of arousal from stress can increase our  
18 ability to perceive. If some outside object causes us to feel fear, curiosity, anger or irritation  
19 toward it, we will usually pay more attention to that object and can recall it better at a later  
20 time. However, at some point these arousal levels can go past an optimal point and  
21 performance on perception tests will decrease. A good example is having a gun pointed in your  
22 face – an arousing event, but one that may make it difficult for you to focus on perceiving or  
23 recalling anything else around you, even the person holding the gun.

24  
25 Studies involving stress normally involve weapons or violent activity and no stimulus of  
26 this type was involved in this case. However, the combination of dealing with multiple  
27 customers at the bank counter, the drive-up and the ATM simultaneously possibly raised the  
28 teller’s stress level to a point where perception of any particular stimulus was distorted. Let me  
29 stress that this is a hypothetical example of how stress can effect perception. I have never met  
30 Bailee and I have no objective method of evaluating this particular teller’s stress level, on this or  
31 any other occasion. I also have no way of measuring whether the stress had a positive or  
32 negative effect on Bailee’s perceptions, although split-stimulus arousals almost always result in  
33 decreased accuracy of memory in experimental studies.

34  
35 I would also note that the conditions of an observation can affect the ability to perceive  
36 – another common sense observation that is borne out in the research. The closer you are to  
37 an event, the clearer your view and the fewer obstructions, the more accurate will be your later  
38 recall of the details.

1           The retention or storage process of identification is primarily affected by the passage of  
2 time. Although some of us have an excellent long-term memory of some significant events, our  
3 recall of detail will generally diminish the longer someone waits to ask us about those details.  
4 Test groups asked to recall facial details within a few minutes of observing photographs could  
5 do so with 98% accuracy; after a few weeks, their accuracy rate to recall the same details was  
6 reduced to 57%. The passage of time also makes subjects more vulnerable to suggestion and  
7 distortion by others, unless recall concerns their most important memories.

8  
9           Suggestibility can play a significant role in memory distortion, during both the retention  
10 and recall process. Sometimes, these suggestions are generated internally. Eyewitnesses can  
11 experience what is called unconscious transference – they will misidentify a person they do not  
12 realize is familiar to them as a perpetrator of a crime. For example, in 1988, a Los Angeles judge  
13 picked a subject out of a police photobook as the person who had attacked her while jogging.  
14 The judge had sentenced the subject four years earlier for a similar crime, a fact she did not  
15 recall until it was brought to her attention. Because the subject did not remotely resemble the  
16 judge's original detailed description of her attacker, the case was eventually dismissed. This is  
17 just one of many anecdotes that illustrate this phenomenon, which remarkably has not been  
18 the focus of any detailed scientific study.

19  
20           Another good example of internal suggestion in this case is the testimony of witnesses  
21 about the height of the shadowy figure in the videos. After looking at a still shot produced from  
22 the video, Exhibit 6, it does not appear that anyone could accurately judge this figure's height  
23 from these images. Yet those witnesses who believe in the defendant's guilt and who viewed  
24 this video report a stunted individual, while the defense witnesses see someone who towers  
25 over the nearby stanchions. Suggestion begets misperception. This example is based only  
26 upon the screen shot that I was provided. I have not seen the original videos or other  
27 photographs, so those may provide better evidence of relative height.

28  
29           Law enforcement investigators can also greatly influence what a witness "remembers"  
30 about a crime. Showing photographs of potential suspects to eyewitnesses is fraught with peril,  
31 even when multiple pictures are displayed. In a standard photo montage, the officer knows  
32 who the suspect is and may provide unintentional cues to the eyewitness, through leading or  
33 suggestive questions. A montage procedure may cause a witness to exercise relative judgment  
34 – he or she will unconsciously assume that a picture of the perpetrator is present and select the  
35 photo which most resembles the person remembered. Even worse in terms of suggestibility is  
36 a photo "show-up" where only one picture is displayed.

1           One factor that does not appear to be statistically related to accuracy is a person's  
2 subjective belief that he or she has picked the correct individual. Witness confidence in the  
3 accuracy of identification is not strongly correlated with objective accuracy. There are a few  
4 studies that show a weak correlation between the two, but from a scientific perspective it is too  
5 small to have practical application. So Bailee's strong belief that the identification of Carden is  
6 correct doesn't mean much to a psychologist.

7  
8           As mentioned before, I am not expressing an opinion on the accuracy of any individual's  
9 identification of someone else in this case, because that would not be appropriate. I have not  
10 met or tested anyone involved in the case. Such tests would have little meaning with regard to  
11 an event that has already occurred, especially when the identification after that event occurred  
12 without controlling for variables such as the display of photographs and the officer's method of  
13 asking for identification. But the jury should consider the science I have described in deciding  
14 whether the identification in this case convinces them beyond a reasonable doubt.

1 STATEMENT OF KAHUNA THORNHILL

2  
3 If, as George Santayana observed, wisdom comes by disillusionment, then I am one of  
4 the smartest people around. My name is Kahuna Thornhill and until my unjust dismissal, I was  
5 the top assistant manager at the Alki City LivGud4Less. I started my employment there with  
6 high hopes, both for the job and for the enrichment it would bring to my later work. After just  
7 9 months, I found myself out of a job, waist-deep in debt and disenthralled in every sense of  
8 the word.  
9

10 My career goal is to become a writer and I have the training to be successful in that  
11 pursuit. After earning a general studies degree at the Hesse Institute, an outstanding liberal  
12 arts college, I took out a loan and went straight into the master of fine arts program at the  
13 University of Alaska in Fairbanks. The isolation and the long, dark winters produced the perfect  
14 mood for the type of literature I wanted to create, deep, cutting edge explorations of the soul.  
15 I returned to Washington after graduation, ready to make a real contribution to human  
16 understanding.  
17

18 However, after years in academia, I decided that I needed to spend some time with real  
19 people, out in their everyday, mundane world. Besides that, I was low on cash and the student  
20 loans were coming due. So I applied for various jobs in retail, where I could interact face-to-  
21 face with the common folk. The first position I landed, as a clerk on the graveyard shift of a local  
22 convenience store, was certainly gritty enough. But almost no one came in during my shift,  
23 except for delivery people and a clump of coffee seekers at sunrise.  
24

25 The floor clerk position at LivGud4Less looked much more promising, a real chance to  
26 observe potential characters for my future novel. And no toilets to clean! I really enjoyed the  
27 work and I was good at it, if I do say so myself. The company thought so too and after only  
28 three months, I received a raise and was promoted to assistant manager.  
29

30 In retrospect, moving to management was a mistake. The focus shifted from meeting  
31 with a broad range of customers to dealing with the niggling concerns of floor clerks and the  
32 petty preferences of the rest of the management team. It didn't help that the store's manager,  
33 Sam Drucker, turned out to be a self-aggrandizing jerk, quick to take credit for any  
34 improvement in sales and just as ready to bellow blame for every little thing that went wrong.  
35 Drucker focused mostly on Sydney Carden and the constant absences, but all of us received a  
36 regular blast of "constructive criticism".  
37

1           No matter what Drucker claims, my dismissal was the direct result of my complaints to  
2 the regional office about various violations of store policies, which resulted in improper loss to  
3 consumers and unjust enrichment of store management. For example, Sam encouraged  
4 employees to raid lost and found for any items they would like to use. The policy for how  
5 quickly a lost coat or watch became abandoned property was very liberally construed when  
6 Sam wanted that item.

7  
8           Another violation of company standards involved clocking in and then leaving before the  
9 shift was over. Drucker allowed employees to clock each other out when things were slow and  
10 I even took advantage of this a couple of times, until my conscience started to bother me.  
11 Here again, the manager was the biggest beneficiary. Sam usually left early and asked Chas and  
12 Sydney to, as we called it, dual punch the card. I wouldn't do it, so Drucker quit asking me. To  
13 cover this bad behavior, Sam repeatedly gave out the "secret" alarm code the manager was  
14 assigned so it would look like Drucker was closing the store. The codes were a joke anyway -  
15 everyone knew Sam's simple system for assigning these numbers and other employees were  
16 often standing around when the codes were programmed into the system.

17  
18           All of this misbehavior was reported to the regional manager. As a whistleblower, I  
19 thought that corporate would protect my identity and take appropriate action. But it turned  
20 out that I was just whistling in the dark. Nothing changed, except Sam's attitude towards me.  
21 I'm convinced Drucker found out that I was making the complaints, although I don't have any  
22 proof of that. I do know that management started looking for any excuse to fire me, and they  
23 found one on August 28, 2019.

24  
25           When I entered the store on August 22, to start a regularly scheduled shift as the closing  
26 assistant, something lying under the outside canopy caught my eye. Sitting on the lower edge  
27 of one of the pillars was a pocketbook, neatly folded and so plainly visible that I don't see how  
28 anyone could have missed it there. It was almost as if someone deliberately placed it on the  
29 pillar – maybe a passerby who saw it on the ground, anticipating the owner's return. The  
30 pocketbook was one of those unisex types meant to carry a few personal items. Inside, I found  
31 what appeared to be a wad of cash, some credit cards, scraps of paper and identification for  
32 someone named Cash.

33  
34           We're supposed to hand over found valuables to either loss prevention or the manager  
35 on duty. When I checked in at the office, Carden and Drucker were there and I showed the  
36 pocketbook to them. Sydney's eyes nearly popped out when I mentioned Carey Cash, although  
37 the name was not familiar to me. Store policy requires the finder and whoever receives a  
38 found container to inventory it together and double sign off on the contents. But Drucker

1 chewed me out about being late (five minutes, to be exact) and abruptly told me to start my  
2 opening shift rounds. I was suspicious that Sam didn't want me to see what happened to the  
3 pocketbook, but I did as I was told.  
4

5 In closing the store that night, I followed the usual routine. First, I did a walk-through  
6 and made sure that there were no customers in the aisles or still using the bathrooms. I locked  
7 the emergency exits and assembled the remaining associates. I was going to select Jenny to  
8 help with the audit, but Jason told me that Sam had asked him to audit and help with closing,  
9 and had given him an alarm pass code so he could lock up if I had to leave early. That was when  
10 I noticed that the store manager had again left early without bothering to let me know.  
11

12 Everyone else left, and I locked the front doors. Jason and I did the audit, counting the  
13 seed money for the tills and confirming the amount in the night deposit. I put the seed money  
14 in the safe box and noticed that the pocketbook was still there, although it looked thinner than  
15 when I had turned it in. I closed the safe and locked and checked each office door.  
16

17 Jason and I walked the building one more time, to make sure everything was in order  
18 and everyone was out. In the foyer, I unlocked the front doors and then activated the alarm  
19 with my code – unlike some people, I take this responsibility seriously. I told Jason the code he  
20 had been given would be reset by tomorrow morning, although I knew that was a lie. We  
21 walked out, I locked the outer doors and I told Jason I would see him on Monday, his next shift.  
22

23 After I left the store, I drove to the bank and made the night deposit. I then drove  
24 home, which is about 5 blocks from the store and went straight into my apartment. Given the  
25 time it normally takes to do these things, I would guess it was about 10:25 pm, although I really  
26 wasn't paying attention. I can't fall asleep right after a night shift, so I stayed up a while, either  
27 reading or playing a video game with others on line. So I was still up and dressed when I  
28 received a call from security at the store.  
29

30 The security dispatcher told me that the lights were on throughout the store and their  
31 records showed that the alarm was disabled by a code entered at 2:28 am. I glanced at my  
32 phone, which keeps fairly accurate time, and noted that it was 2:53 am. Great security, I  
33 thought, but I asked them to call the police as soon as possible. I hopped in the car and headed  
34 to the store, arriving just before 3 am. The police arrived less than fifteen minutes later.  
35

36 Just as security indicated, the lights were all on and the exterior door was unlocked.  
37 When I entered the foyer, the sliding doors inside opened, indicating the night alarm was  
38 disabled. I waited for the police to show up before I went inside. After the officers did a brief

1 search and didn't find anyone inside, I walked around with them to see if anything was missing  
2 or damaged. There was an umbrella stuck between the emergency doors in the back, like  
3 someone had tried to leave with it open and wasn't fast enough. I picked the umbrella up by  
4 the handle and laid it in the layaway wall, so I could close the emergency doors. I don't know if  
5 an officer saw me with the umbrella, but no one told me not to close the doors.

6  
7 After about twenty minutes, I called Drucker and gave a report on what was happening.  
8 Sam didn't seem that interested in coming down, but I figured the store manager should be  
9 there. When Sam arrived, I didn't see any surprise or shock displayed, which I thought was  
10 suspicious. Sam went to the video room with Detective Gerard and I watched with them for a  
11 few minutes. You really couldn't see anything, just a blob moving around in the store. No  
12 chance anyone could make out height or other features. The shadow figure in Exhibit 6 is  
13 typical of what you could observe when the footage was moving. That figure looks taller than  
14 Carden, closer to Sam and me (and I know it's not me). But who can tell?

15  
16 After a while I left to check the merchandise displays with the officers. Everything was  
17 the same as when I left, except for a couple of backpacks on the floor near their display, as if  
18 someone had brushed them or pulled one of them off the rack. The umbrella shown in Exhibit  
19 4 was the only other store property that was out of place.

20  
21 I can tell you that there is no way anyone could have made out a distinct silhouette  
22 through the umbrella I picked up. The umbrella was one of those heavier canvas types,  
23 designed and built for the Northwest. Besides, other than Alfred Hitchcock, who could you  
24 identify from their darkened profile? The officers left the umbrella where I had placed it by the  
25 door and we eventually closed it up, marked it on clearance and sold it on our discount table.

26  
27 Since Drucker was handling things with the police, I went home and didn't have  
28 anything more to do with the investigation after that night. Sam did not ask me to review or  
29 preserve any video recordings and I wouldn't have known what Detective Gerard wanted  
30 preserved in any event. But once the videos were overwritten, suddenly it was my  
31 responsibility to make sure that didn't happen. Like I said, the little despot was looking for an  
32 excuse to can me, and I was discharged three days later.

33  
34 I'm not taking this lying down. I contemplate bringing legal action against Drucker and  
35 LGL, as soon as I get out from under my bills and can hire an attorney. In the meantime, you  
36 can read all about my story on my well written website, *The Truth Behind LivGud4Less* and hear  
37 the latest about their corrupt activities during my regular podcasts. To help advance the cause  
38 of openness and justice, please patronize the advertisers supporting these sites.

1 STATEMENT OF AVERY ATARO

2  
3 Need a lift? Then use the MuvR app on your mobile device and you might be lucky  
4 enough to experience the deluxe ride service I provide to all of my customers in my spotless  
5 Subaru. Heck, you can even ask for me by name – Avery Ataro – if you can schedule your travel  
6 far enough in advance.  
7

8 I've been driving for a living, in one form or another, for almost 30 years. I started with  
9 the Mustard Cab Company, back when taxis were the only game in town. After a few years, I  
10 decided to quit moving people and try the more lucrative occupation of hauling freight. I was a  
11 long-haul trucker for 15 years, which did pay a lot better. But my back started to give me fits  
12 and I got tired of being away from home all the time. Since 2015, I've set my own flexible  
13 schedule here in town, as an independent contractor with the ride-sharing service MuvR. The  
14 income is a lot less, but I can choose when to work and what and who to drive.  
15

16 My all-wheel drive lets me get around town in any weather and I can take a party of four  
17 and their luggage anywhere they want to go, as long as one of them doesn't mind sitting in  
18 front. There are two types of riders, those who want to be left alone and those who want to  
19 talk your ear off. For the record (and the tip), I can do either one of them for you and I only  
20 take the scenic route if that is your choice – otherwise, I know the shortest, most economical  
21 route to your destination. That's why I'm proud to say that I have nothing but four and five star  
22 reviews (except for those posted by obviously jealous competitors).  
23

24 When you see as many people as I have over the years, very few of them stand out in  
25 my mind. Someone would have to be a really interesting character, or a frightening bore, for  
26 me to remember that person without any kind of prompting, even if he or she rode with me  
27 just last week. To refresh my recollection of particularly good (and bad) fares, I maintain a  
28 journal about each of my runs, with names, destinations, tip amounts and any comments or  
29 information I might need when I'm deciding whether to pick that person up again.  
30

31 I've been asked to testify about two runs that I made in August, 2019. The first trip was  
32 more of what you might call a meander; it took up almost my entire day. Around 10:30 am on  
33 August 22nd, I was asked to contact somebody named Carey Cash about driving and waiting at  
34 several local stores while this person and "the posse" went on a shopping trip. The posse was  
35 Cash's term, not mine. I just know that three other folks were along for the ride.  
36

37 I didn't have any other scheduled trips that day and the customer didn't have a bad  
38 rating (we drivers keep track of things like whether you stiff us, either MuvR or for any other

1 local ride-share company and we share that information). So I agreed to take the business, so  
2 long as the trip would be done by 6:00 pm.

3  
4 That was one of the weirdest shopping trips I have ever been on, let me tell you. First,  
5 Carey and the posse talked to each other non-stop about every goofy thing you could imagine.  
6 Some of it was about two weasels they had rescued, all the cute things these critters did and all  
7 the damage they had caused to Cash's house. Most of it was about story arcs and podcasts and  
8 montages and special effects. And also what sorts of new, exciting things Carey could do to  
9 gain publicity. Something about dropping the book or making book or booking it – it was a lot  
10 of gobbledy gook, if you ask me. They were loud, but not rowdy, so I let it pass and focused on  
11 the road.

12  
13 We went to department stores, pet stores, the local humane society – eight or nine  
14 different places. They must have been looking for something specific, because they never  
15 spent more than 20 minutes at any of the places we stopped. And nobody bought a thing the  
16 entire time we were out, except for some cheese covered chips, which I told them they could  
17 not eat in the car, period. Finally, the posse – I didn't note any of their names – got out at a  
18 downtown restaurant and Cash told me to drive back to the original pick-up location.

19  
20 As we passed the LivGud4Less, a store that was pretty close to where this whole drive  
21 started, Cash asked me to pull in to the parking lot. I complied (the meter runs until you arrive  
22 at the final destination) and Carey headed for the front doors. I figured on settling in for  
23 another 20 minutes of waiting, but Cash came back out in less than 3 minutes. Must have been  
24 told at the front register that the store didn't have whatever Carey was looking for, because a  
25 person could barely get in and out the door in that time. Cash stood by the front entrance  
26 pillars for a minute, deciding where to go next, I thought. Then Carey moved over to the  
27 Subaru, got in and told me to drive to the house.

28  
29 When we arrived, I pulled out my credit/debit card reader and told Cash the fare. To my  
30 surprise, Carey claimed the oldest trick in the bum rider's book – pocketbook was missing or  
31 home or something like that. I was just about to mention the police. But Cash said I could just  
32 punch in the debit card number and password and then recited both of them for me from  
33 memory. That worked, and Carey included a very substantial tip, so I changed my mental "rider  
34 rating" to a "will definitely pick up again."

35  
36 The second ride I have been asked to discuss took place two days late, on the evening of  
37 August 24th. After reviewing my journal, I remember this one as well, but for a decidedly  
38 different reason. This was an out of town trip, from an address within a couple of miles of the

1 Cash residence. My fare was a Frankie Baker and I was to deliver two passengers and their bags  
2 to that new hotel and casino. You know the one, with that huge display fountain, about 70  
3 miles north of downtown.  
4

5 The casino is called the Klalhalah Resort, which I'm guessing has a distinctive Native  
6 American pronunciation. I will always call it the KA-LA-LAY. That's because Baker, or as I  
7 referred to Frankie in my journal, the "Loudmouthed Jerk," must have said that at least sixty  
8 times during the trip. "Whoo-hoo! Going to KA-LA-LAY! Yeah, baby!" and comments of that  
9 nature, over and over again. Baker mainly seemed to be talking to the air, although some of  
10 the comments were directed into the other passenger's ear, at very close range. Even I got a  
11 couple of these blasts in my direction, accompanied by gratuitous and unwelcome shoulder  
12 slaps.  
13

14 The passenger looked a lot like the defendant, Sydney Carden. I couldn't say that for  
15 positive, but you have to understand that I was trying to avoid eye contact with the back seat.  
16 When I did glance back there, the other passenger looked pretty shaken and embarrassed. I  
17 couldn't say that I blamed that individual and I didn't want to make matters worse. So I took  
18 the most direct route to the casino that I could, even did a little speeding. Finally, the two of  
19 them got out and Baker paid the quoted fare.  
20

21 Exhibit 5 is a copy of the receipt I provided to Baker that night. It shows the date and  
22 time of arrival. The card reader has its own internal clock and calendar, and I don't have  
23 anything to do with setting that thing. I assume it is pretty accurate. The amount on the receipt  
24 is accurate – including the fact that Loudmouthed Jerk left no tip.  
25

26 This same Frankie Baker requested a ride back from the casino for two people on the  
27 morning of August 27. After stiffing me on the tip, Loudmouth had the nerve to ask for me  
28 specifically – must have liked the low price. I declined the request and put the name and the  
29 address on my "will not pick up" list. I never heard from Baker again and have not had any  
30 further direct contact with Frankie or the other passenger.

# Exhibits

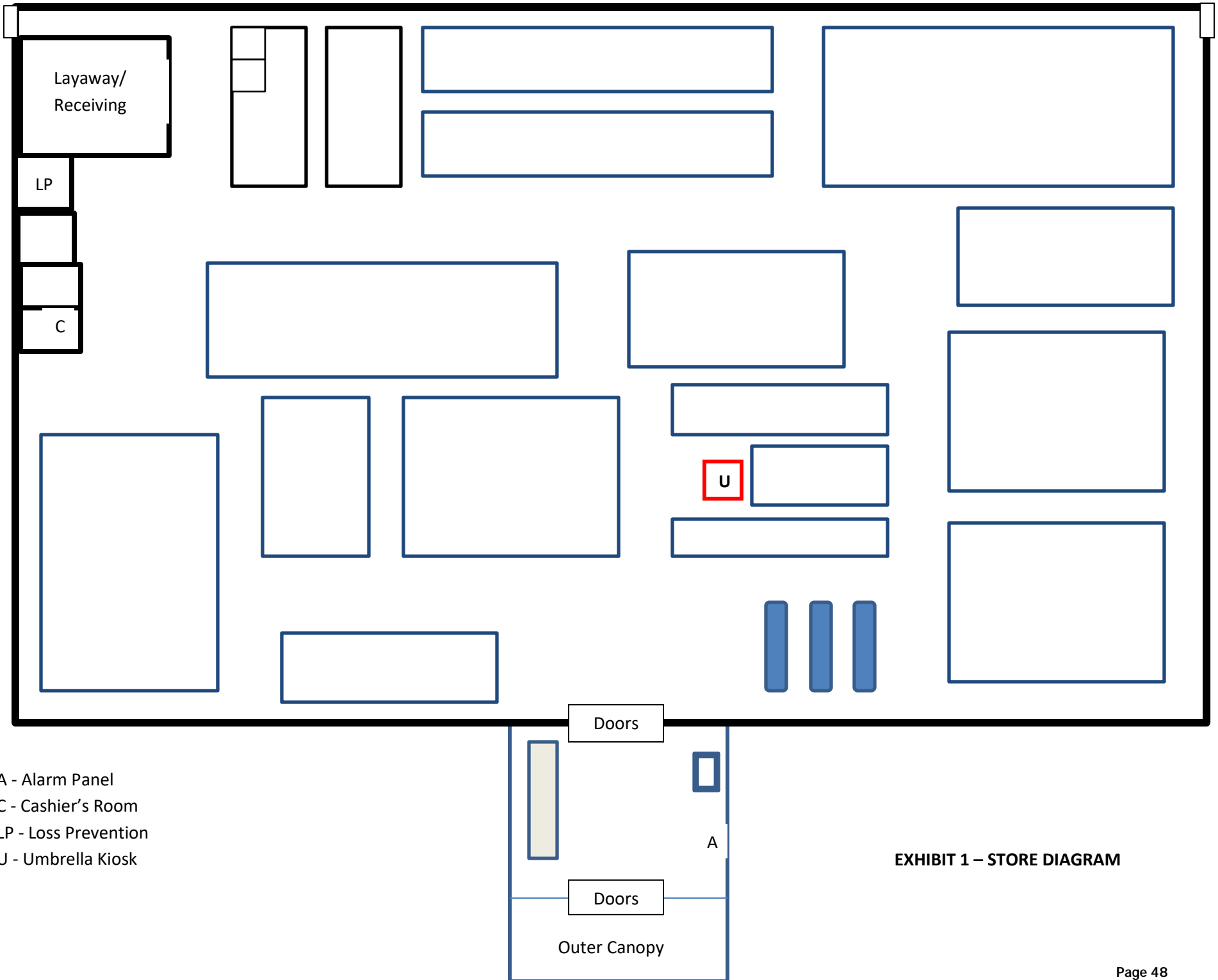


EXHIBIT 1 – STORE DIAGRAM

## EXHIBIT 2 – SECURITY REPORT

AUGUST 21-23, 2019

<u>Alarm Event</u>	<u>Date/Time</u>	<u>Authorized Code</u>	<u>Test?</u>
Miscode:	08212019 0735	10252	No
Deact:	08212019 0736	10225	No
Act:	08212019 2108	10227	No
Deact:	08222019 0750	10225	No
Act/Deact:	08222019 1655	10220	Yes
Act:	08222019 2121	10227	No
Miscode:	08232019 0225	10223	No
Miscode:	08232019 0227	10224	No
Deact:	08232019 0228	10225	No

### CODES

<u>Code No.</u>	<u>Employee</u>
10221	Sam Drucker
10225	Sydney Carden
10227	Kahuna Thornhill
10220	Chas Darney
00911	Alki City PD

# SUNSHINE Federal Credit Union



“CU” in the Sunshine!

## ATM Withdrawals/Attempted Withdrawals – Machine # 441808 (South Central Branch)

Account No. XXXX-XXXXXX-X01121

August 1-31, 2019

Account Owner: Carey Cash

<u>Date</u>	<u>Time</u>	<u>Amount</u>	<u>Completed?</u>	<u>Error Code</u>
8-1	14:33	\$150	Yes	NA
8-16	16:44	\$100	Yes	NA
8-24	10:44	\$400	Yes	NA
8-24	12:32	\$400	Yes	NA
8-24	14:46	\$400	No	6
8-24	14:48	\$400	No	6
8-24	14:49	\$400	No	11
8-24	14:51	\$400	Yes*	NA

*\* Transaction Completed with Teller Assistance*

### **Error Codes**

- 6 Card Not Recognized and/or Not Readable by Machine
- 11 Card, Currency and/or Paper Receipt Jam

EXHIBIT 3 – ATM PRINTOUT



EXHIBIT 5



8/24/2019

20:13:45

**Card No:** XXXX-XXX-9999

**Name:** Baker

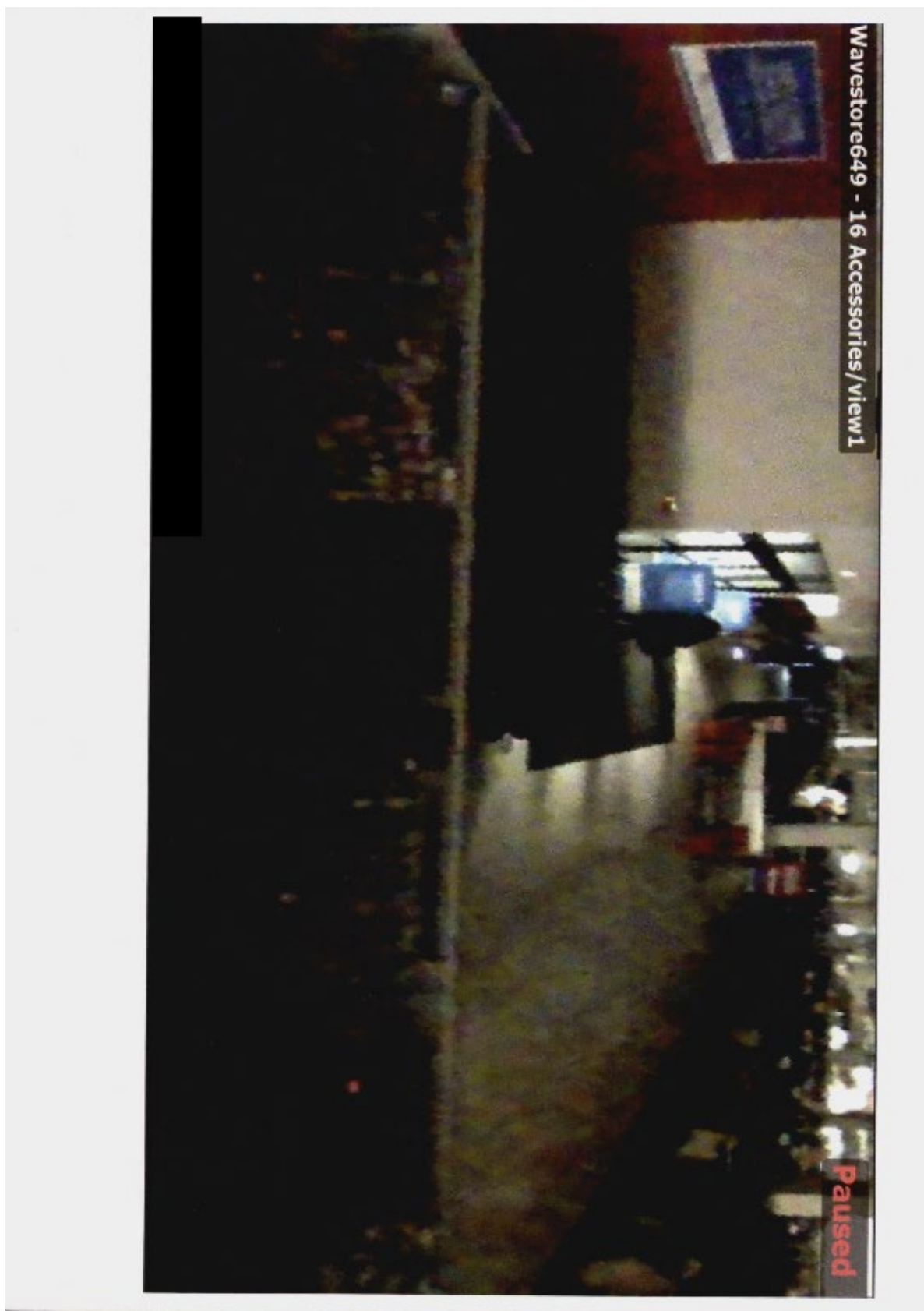
**Amount:** \$ 124.12

**TIP:** \_\_\_\_\_

**Total:** \_\_\_\_\_

**Ref No:** 56000000000343

**THANK YOU!**



# **Pretrial Motions**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PINE

STATE OF WASHINGTON,	)	
	)	NO. 19-1-01101010
	)	
Plaintiff,	)	STATE'S MOTION TO EXCLUDE
	)	EVIDENCE OF WRONGFUL ACT
vs.	)	OF WITNESS CAREY CASH
	)	
SYDNEY CARDEN,	)	
	)	
Defendant.	)	

COMES NOW the State of Washington, by and through its deputy prosecuting attorney, and moves the court for an order excluding all evidence of and reference to allegations that a State's witness, Carey Cash, staged an assault on his person in 2017, and then falsely reported this staged crime to the police.

The evidence is inadmissible under the provisions of ER 404(b) and ER 608. Further, the details of this incident have little or no relevance to the issues in this case and would confuse and distract the jury. The evidence is therefore inadmissible under ER 401 and should be excluded pursuant to ER 403.

DATED this 1<sup>st</sup> day of December, 2019.

STATE OF WASHINGTON  
PINE COUNTY

BY /s/  
Deputy Prosecuting Attorney

## **AUTHORITY FOR PRETRIAL MOTION**

### **ER 401:**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

### **ER 402:**

All relevant evidence is admissible, except as otherwise provided in these Rules. Irrelevant evidence is not admissible.

### **ER 403:**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, if it confuses the issues, if it is misleading, or if it causes undue delay, wastes time, or is a needless presentation of cumulative evidence.

### **ER 404:**

(a) Character Evidence – Evidence of a person’s character or character trait is not admissible to prove action regarding a particular occasion, except: . . . (2) Character of victim. – Evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut same, . . . (3) Character of witness. – Evidence of the character of a witness as provided in ER 607, 608 and 609.

(b) Other crimes, wrongs or acts. – Evidence of other crimes, wrongs or acts is not admissible to prove character of a person in order to show an action conforms to character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

### **ER 608:**

(b) Specific instances of conduct. – Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative or truthfulness or untruthfulness, be asked on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness . . .

***State v. Barker, 75 Wn. App. 236 (Court of Appeals, Division 1, 1994)***

Barker was charged with first degree robbery and second degree assault.

At trial, Duane Roessel testified that on November 4, 1992, he was walking home when a truck pulled up next to him. Barker, the driver, offered him a ride. . . . Roessel asked to be dropped off at a Texaco gas station near his home. When they approached the station, Barker did not stop, stating that he wanted to drop one of his other passengers off first. When they reached a nearby trailer park, Barker robbed and stabbed Roessel. Roessel eventually got away and called the police, who arrested Barker later that night.

*[Barker was convicted of robbery and acquitted of assault. The Court of Appeals ordered a new trial, based upon a self-representation issue. However, the appellate court upheld the trial court on an evidentiary issue]:*

Barker claims the court should have permitted him to introduce evidence that Roessel had been convicted of a DWI and that as a condition of his probation he was not to have any alcohol or illegal drugs, to support Barker's defense that Roessel fabricated the robbery allegations to cover up his use of alcohol and/or drugs that evening. Barker asserts that the fight was a fight over drugs or alcohol.

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a person acted in conformity with the character trait evidenced by that prior bad act. ER 404(b). However, the trial court, in its discretion, may admit such evidence if it determines, first, that the evidence is logically relevant to and necessary to prove an essential element of the crime charged, such as motive or intent. Next, the court must determine whether the probative value of the evidence outweighs its potential prejudice under ER 403.

The admission or refusal of evidence lies largely within the discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. Whether evidence of prior "bad acts" is admissible under ER 404(b) is largely within the discretion of the trial court.

We find that the court correctly denied the admission of the DWI evidence. The court found that the evidence was not relevant to prove the essential element of motive under ER 404(b), stating that "I don't see that the existence of a conviction or the fact that he was under a probation condition makes it any greater or more likely that if he doesn't want to be discovered that he's under the influence of drugs. That motive is there regardless of the existence of a DWI conviction or not." We agree. Had Roessel waited to report the incident, giving himself time to recover from the effects of any alcohol and/or drugs, Barker's theory of fabrication might make sense. However, Roessel reported the incident immediately after it occurred. Further, admitting the evidence that Roessel was on probation for a DWI and would be subjected to penalties beyond the average citizen for illegal drug activity gives Roessel even less incentive to lie about being robbed. Even if Roessel had not been on probation, any illegal drug use would subject him to potential criminal prosecution.

***State v Young*, 48 Wn. App. 406 (Court of Appeals, Division 3, 1987)**

Bradley Young appeals his conviction of two counts of vehicular homicide. He contends the court erred by (1) refusing to admit prior instances of misconduct pursuant to ER 404(a), (b) . . . We reverse.

In the early morning hours of April 17, 1985, a pickup truck owned and driven by Mr. Young went out of control near Bremerton and left the road, injuring Mr. Young and killing the two passengers, Vince Setzer and Curt Pelham. As a result, Mr. Young was charged with two counts of vehicular homicide pursuant to RCW 46.61.520.

At trial Mr. Young testified that earlier that evening he had met a friend with whom he had two drinks. Afterward he encountered Mr. Setzer and Mr. Pelham at a Poulsbo tavern where they played pool. Mr. Young had two bottles of beer while at the tavern. . . . Mr. Young testified that on the way home Mr. Setzer, who was seated next to him, reached over and grabbed the steering wheel. Mr. Young jerked it back, turning it to the left which headed them in the direction of the bank on the other side of the road. He stated he corrected it again, this time to the right, and applied his brakes as the truck traveled sideways. The truck hit the guardrail, became airborne, and landed on its side. . . . He made an offer of proof that three witnesses would testify Mr. Setzer, as a passenger, had on four prior occasions within the last year and a half grabbed the steering wheel away from the driver. One of the witnesses, a friend of Mr. Setzer, would testify that Mr. Setzer had grabbed the steering wheel of his vehicle twice in the 30 days prior to the accident. . . . The offer was rejected, the court finding the evidence, although relevant, was outweighed by a danger of prejudice, confusion of issues, and misleading the jury pursuant to ER 403. . . .

Generally, any circumstance is admissible which reasonably tends to establish the theory of the party offering it, to explain, qualify or disprove the testimony of his adversary. The admission or refusal of evidence lies largely within the discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. . . .

Mr. Young first argues Mr. Setzer's prior acts of intentional interference with other drivers' control of their vehicles is admissible under ER 404(a)(2) to prove a chronic trait of recklessness. We disagree. Generally, a person's prior conduct is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. ER 404(a). . . It may, however, be admitted when it is relevant and material under ER 404(a)(2). . . . Evidence of a victim's character is relevant in cases where the defense to a charge of homicide is suicide, or self-defense, Admissibility [under 404(a)(2)] is confined almost always to these two situations. 5 K. Tegland, Wash. Prac., *Evidence* § 111 (2d ed. 1982). . . .

Character is defined in E. Cleary, *McCormick on Evidence* § 195, at 574 (3d ed. 1984), as a "generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." (Footnote omitted.) Mr. Setzer's acts on only four prior occasions are insufficient to constitute a trait of chronic recklessness. We find no error. . . .

Mr. Young further argues the evidence should have been admitted pursuant to ER 404(b) to prove identity, control, absence of mistake and modus operandi.

The admission of other acts under ER 404(b) has been used primarily where the prosecution offers the evidence to prove an essential element of the crime or rebut a defense of mistake. . . .

Mr. Young argues the rule is not limited to use by the prosecution and should be equally available to a defendant when used to prove his theory of defense. . . . We agree. Here, Mr. Setzer's prior acts of conduct were relevant for the purpose of proving (1) the identity of the person responsible for the accident was Mr. Setzer, (2) it was he, not Mr. Young, who was in control of the vehicle at the time of the accident, and (3) Mr. Setzer's intentional interference with Mr. Young's steering was the proximate cause of the accident. . . .

The court excluded the proffered evidence on the basis of ER 403. Weighing the probative value of evidence under ER 403 against the dangers of confusion or prejudice, the general rule requires the balance be struck in favor of admissibility. ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense. Here, evidence of Mr. Setzer's conduct on the night of the accident was highly probative and crucial to Mr. Young's theory of defense, that it was Mr. Setzer and not he that caused the accident. Nor is its probative value "substantially outweighed" by the dangers enumerated in ER 403. The balance should have been struck in favor of admissibility. Under these circumstances the court's failure to do so was an abuse of discretion.

\* \* \* \*

***State v Chapman, 679 P. 2d 1210 (Montana Supreme Court, 1984)***

Defendant, George Chapman, appeals from a Silver Bow County District Court judgment entered on a jury verdict finding him guilty of criminal sale of dangerous drugs. The charges stem from an alleged sale of drugs to an undercover police agent in Butte, Montana. . . . We reverse and order a new trial.

For a period of approximately a month and a half before the alleged sale, an undercover, paid State informant made repeated contacts with the defendant, asking defendant to obtain drugs for the informant. Out of this contact defendant relied on. . . [the defense of entrapment]. . .

And to also present his entrapment defense, defendant attempted to present the testimony of a witness who, according to the defendant, experienced or witnessed the same kind of harassment by the informant that defendant experienced. . . . At the trial, defendant again attempted to question Diane Surman to establish that informant's method of operation was to persist in his requests for drugs and to wear down one's resistance to sell drugs. The court again denied defendant the opportunity to question the witness, and again ruled that her testimony was irrelevant and immaterial to defendant's defense of entrapment.

We believe the trial court should have permitted defendant to present evidence of informant's methods in setting up drug sales, even though the sales were with people other than defendant. We analogize to Rule 404, Mont.R.Evid., which, in certain circumstances, allows the State to introduce evidence of other crimes committed by a defendant to prove, among other things, plan, motive or intent of the defendant. The principle behind the rule must be equally available to a defendant who, as a part of his defense, seeks to show a plan or method of operation of the State's informant. The trial court, therefore, should have permitted defendant a chance to prove through the testimony of a witness, that the informant used harassing techniques as part of his method of operation in setting up drug buys. Fundamental fairness requires this result.

**Karl Tegland, Washington Practice Series, Volume 5, Evidence, Section 404.13 (2016)**

Nothing in the text of Rule 404(b) limits its application to prior misconduct of a party. Postrule authority makes it clear that the rule may be invoked in appropriate instances to either bar or admit evidence of prior misconduct by a nonparty.

For example, Rule 404(b) governs the issue of admissibility when a defendant seeks to offer evidence of misconduct by a third party to show that it was the third party, and not the defendant, who committed the crime charged. The evidence is inadmissible to show that the third party is simply a “criminal type,” but the evidence is admissible if it connects the third party with the crime charged in some other, more tangible way. The trial court has considerable discretion in determining whether the evidence is specific and tangible enough to be admissible. . . . In this context, the admissibility of the third party’s misconduct is not governed solely by Rule 404(b). To be relevant, the evidence must also satisfy more general requirements [of Rule 401].

\* \* \* \*

**State v Donald, 178 Wn. App. 250 (Court of Appeals, Division 1, 2013)**

As a matter of apparent first impression, we consider whether the exclusion of evidence of any person's other crimes, wrongs, or acts to show that he acted consistent with his character on a particular occasion, as required by ER 404(b), violates an accused's constitutional right to present a defense. Because ER 404(b) is neither arbitrary nor unreasonably related or disproportionate to the ends it is designed to serve, we reject the constitutional challenge to it.

Harold Donald and Lorenzo Leon assaulted Gordon McWhirter one night as McWhirter stepped outside his apartment to smoke a cigarette. A neighbor called 911. When police responded, they found McWhirter lying in the grass, naked and bloody. His injuries included a lacerated spleen, several fractured ribs and facial bones, a fractured toe, and a serious head wound. . . .

Leon pleaded guilty to one count of attempted robbery in the first degree. . . . The State tried Donald on charges of assault in the first degree, attempted robbery in the first degree, and possession of a stolen vehicle. Donald presented an alternate suspect defense, arguing that Leon alone committed the crimes. The court refused to allow Donald to present evidence of Leon's criminal history and limited the mental health history he sought to present to support this defense. Specifically, the court refused to allow evidence of Leon's prior convictions for violent crimes. It admitted some mental health evidence showing that Leon faked his mental illness but excluded evidence that Leon experienced "command hallucinations," in which a voice ordered him to hurt or kill people. A jury convicted Donald of assault and attempted robbery [and he appeals]. . . .

The plain language of ER 404(a) prohibits the use of character evidence to show circumstantially that a person acted on a particular occasion consistently with his character, with two exceptions that apply only in criminal cases. ER 404(a)(1) and (2) address character evidence of the defendant and the victim. Neither exception applies in this case. ER 404(a)(3) addresses character evidence relating to a witness by reference to ER 607, 608, and 609. Those three rules authorize only the admission of character evidence, in limited circumstances, to attack or support a witness's credibility. Thus, consistent with the general rule,

Washington courts reject the use of evidence of a witness's character to show that the witness acted consistently with that character on a particular occasion.

Consistent with ER 404(a)'s general rule, ER 404(b) excludes a specific category of evidence--any person's other crimes, wrongs, or acts--to prove that person's character to provide circumstantial evidence that he acted consistently with that character on a particular occasion. The second sentence of ER 404(b) preserves the admissibility of this evidence of earlier misconduct to prove other matters, including those described in the rule.

Thus, ER 404(b) expressly prohibits admission of Leon's criminal history to prove his character for the purpose of proving that Leon acted consistently with that history the day he assaulted McWhirter. Furthermore, if ER 404(b) does not apply, the general rule found in ER 404(a)'s first sentence prohibits the admission of any evidence of Leon's character for this purpose.

Donald . . . argues that his constitutional right to present a defense and the policy behind ER 404(b) should cause us to construe the plain language of ER 404(b) prohibiting propensity evidence inapplicable when a defendant offers this evidence to support his defense. . . .

. . . Excluding Leon's criminal history did not significantly undermine any fundamental element of Donald's defense. It did not exclude any witness with knowledge of any fact of the alleged crimes or any part of that witness's testimony. It did not exclude any testimony from Donald. He still could present all of the facts relevant to Leon's involvement in the assault upon McWhirter. ER 404(b) prevented him only from presenting propensity evidence the common law generally excludes because it is distracting, time consuming, and likely to influence a fact finder far beyond its legitimate probative value. Exclusion of propensity evidence furthers two [reasonable] goals . . . It ensures the reliability of evidence introduced at trial and avoids litigation collateral to the primary purpose of the trial. . . . [T]he per se exclusion of propensity evidence to prove how a person acted on a particular occasion is not disproportionate to the ends it is designed to serve.

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***State v Johnson*, 90 Wn App 54 (Court of Appeals, Division 2, 1998)**

Robert Johnson appeals his convictions of felon in possession of a firearm, first degree assault, and second degree assault. We find that the cumulative effect of the following erroneous rulings denied Johnson a fair trial: [including] allowing the State to use a probation violation to impeach a defense witness. Thus, we reverse.

The defense produced two witnesses to support its theory that Johnson did not shoot Purcell. Bates, Johnson's 17-year-old brother, provided an alibi, testifying that Johnson was sleeping at their home at the time of the shooting. And Martin, Johnson's girl friend, said that when Purcell came to her house at 6:45 A.M., he was arguing about money with another man whom she had never seen before and that Johnson was not present. In its cross-examination of Martin, the State impeached her with a 1993 probation violation and her past use of aliases. . . .

IV. Impeachment of Defense Witness

Johnson argues that the trial court improperly allowed the impeachment of Martin with her past uses of aliases. We disagree.

We find no Washington cases deciding whether it is proper to impeach a witness by showing her uses of aliases. ER 608(b) provides that, for purposes of attacking a witness's credibility, specific instances of conduct may, in the discretion of the court, be inquired into on cross-examination if probative of truthfulness or untruthfulness. ER 608(b). The cross-examiner must have a good faith basis for the inquiry.

The use of an alias is a specific instance of conduct that may, depending upon circumstances, be probative of truthfulness or untruthfulness. Conduct involving fraud or deception is indicative of the witness's general disposition with regard to truthfulness.

Here, police records indicate that Martin had used four different aliases in the past. When a person gives multiple false names to the police, the use of those names indicates an intent to deceive and bears directly on that person's general disposition with regard to truthfulness. Thus, the trial court did not abuse its discretion when it allowed the State to cross-examine Martin with respect to her past use of aliases.

This conclusion is consistent with *People v. Walker*, 83 N.Y.2d 455, 461-62, 633 N.E.2d 472, 611 N.Y.S.2d 118 (1994), in which the court stated:

Manifestly, a [subject's] use of a false name or other inaccurate pedigree information is an indication of dishonesty that goes to the very heart of the question of that individual's testimonial credibility. Giving false pedigree information in situations where one is called upon to be truthful is, by definition, an act of prevarication . . . . Accordingly, such evidence is generally "both relevant and material to the credibility, veracity, and honesty" of the witness and is therefore a proper subject for cross-examination.

Johnson also argues that the State improperly impeached Martin with her failure to comply with a probation order. We agree. [*Finding error under ER 609(a)(2)—and finding error on several other grounds*]

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***State v Harper*, 35 Wn. App. 855 (Court of Appeals, Division 2, 1983)**

By jury verdict, Dencil Rudolph Harper was convicted of the crime of indecent liberties . . . He contends on appeal, primarily, that he was denied a constitutionally guaranteed fair trial by reason of a series of trial court errors which resulted from the prosecution's successful presentation of improper evidence and the denial of his right to present proper evidence. We agree and, accordingly, reverse and remand for new trial. . . .*[But the trial court was upheld for its ER 608 decision]:*

Finally, we consider defendant's proposal to attack the child victim's veracity by presenting evidence of her previous check forgeries, for which, however, she had never been charged or convicted. Here, again, the court must be guided by ER 608(b). Specific instances of the witness' misconduct may not be proved by extrinsic evidence. Nevertheless, the rule provides that specific instances of the witness' conduct may, however, in the discretion of the court, if probative of untruthfulness, be inquired into on cross examination of the witness concerning her character for untruthfulness. Evidence of previous forgeries attacks the witness' reputation for honesty; it does not attack her veracity. Accordingly, evidence of these previous acts of misconduct should not be admitted.

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***State v Wilson*, 60 Wn. App. 887 (Court of Appeals, Division 2, 1991)**

In 1989, Joseph Wilson was convicted of one count of statutory rape in the second degree and one count of indecent liberties. On appeal, he argues that the trial court erred in admitting evidence that he physically assaulted the victim and that a witness, Billie Wilson, made a prior false statement under oath, which was at variance with her trial testimony. We affirm. . . .

**Evidence of Specific Bad Acts**

Next, Wilson contends that the trial court erred under ER 404(b) and ER 608(b) in allowing the State to impeach the defendant's wife, Billie Wilson, by asking her about a prior false statement made under oath. Billie Wilson testified for the defense that she was unaware of any incident of abuse; that Wilson resided in her household at the time of the alleged sexual abuse and, therefore, she would have known had such abuse occurred. The State impeached Billie Wilson by eliciting her admission that she had previously stated under oath, on Department of Social and Health Services financial assistance forms, that her husband was not a member of her household at the time in question.

ER 404(b) applies only to prior misconduct offered as substantive evidence. *See* 5A K. Tegland, Wash. Prac., *Evidence* § 114 (3d ed. 1989). Wilson's residency was not at issue. Therefore, admissibility is governed by ER 608(b) because the prior misconduct (an admittedly false statement under oath inconsistent with trial testimony) was offered for the limited purpose of impeachment. *See* 5A K. Tegland, Wash. Prac., *Evidence* § 114 (3d ed. 1989). . . .

This rule is identical to Fed. R. Evid. 608(b) and appears to change the prior Washington case law that made acts of misconduct not the subject of a prior conviction inadmissible for impeachment purposes. *See* Comment, ER 608(b); *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953).

The federal courts allow cross examination into specific instances of conduct bearing on the credibility of the witness. *See, e.g., United States v. Terry*, 702 F.2d 299, 316 (2d Cir.) (trial court did not err in allowing the government to cross-examine the defendant's voice expert about prior occasions when the expert's testimony in other cases had been criticized by the court as unworthy of belief; proof that witness had "guessed under oath" was probative of the weight to be accorded his testimony), *cert. denied sub nom. Guippone v. United States*, 464 U.S. 992, 78 L. Ed. 2d 680, 104 S. Ct. 482 (1983); *United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980) (defendant placed his credibility at issue when he took the witness stand; cross examination of defendant concerning his own false statements in a letter was "entirely proper to impeach appellant's general credibility" under rule 608(b)), *cert. denied*, 454 U.S. 829, 70 L. Ed. 2d 105, 102 S. Ct. 123 (1981); *United States v. Bright*, 630 F.2d 804, 817 (5th Cir. 1980) (no abuse of discretion in permitting cross examination concerning pending state fraud charge against witness).

However, there are limits to this rule. The instances must be probative of truthfulness and not remote in time; further, the court should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury) .

..

Washington case law allows cross examination under ER 608(b) to specific instances that are relevant to veracity. *See State v. Cummings*, 44 Wn. App. 146, 152, 721 P.2d 545, *review denied*, 106 Wn.2d 1017 (1986). "Any fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue." *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980).

Here, evidence of Mrs. Wilson's prior false statement under oath was relevant to veracity. It was also germane to the issue of sexual abuse because Billie Wilson testified that Wilson could not have committed sexual abuse. Further, her credibility was important because her testimony corroborated that of the defendant. The prior false statement fit within the parameters of ER 608(b) and its admission was well within the trial court's discretion.

Wilson also argues that even if the testimony was admissible, the court erred in allowing the State to ask its questions in such detail. The State asked Billie Wilson many questions about the Department of Social and Health Services forms, showing that she filled out the documents under penalty of perjury, that she failed to list Wilson as a member of her household, that she never filled out a "change of circumstances" form, and that she affirmatively misrepresented Wilson as her baby-sitter. The probative value of these questions outweighs any cumulative or prejudicial effect since they demonstrate the extent to which Billie Wilson could be untruthful. The trial court did not abuse its discretion in admitting the evidence.

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#### ***State v LeClair*, 730 P. 2d 609 (Oregon Court of Appeals,1986)**

Evidence of prior false accusations by a complainant is certainly probative on the issue of credibility. Courts have uniformly stated that, when a complainant has recanted prior accusations or they are otherwise demonstrably false, the trial court must allow the defendant to cross-examine the complaining witness regarding them.

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**Karl Tegland, Washington Practice Series, Volume 5A, Evidence, Section 608.6 (2016)**

When the defendant is accused of a sexual offense but believes that the alleged victim has made false accusations of sexual abuse in the past, the question arises whether the victim may be cross-examined about the false accusations. Although false accusations arguably fall within the cross-examination allowed by Rule 608, such cross-examination has been prohibited by the trial court and affirmed on appeal in a number of Washington cases. None of the cases, however, held that cross-examination about false accusations was forbidden as a matter of law. The cases held only that the trial court acted within its discretion in forbidding the cross-examination because the defendant had insufficient evidence that the accusations were false.

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***State v Lee*, 188 Wn. 2d 473 (Washington Supreme Court, 2017)**

Donald Ormand Lee was convicted on two counts of third degree rape of a child. Before trial, Lee moved to cross-examine the victim, J.W., about a prior false rape accusation she had made against another person. The trial court permitted Lee to ask J.W. if she had made a false accusation to police about another person, but it prevented Lee from specifying that the prior accusation was a *rape* accusation. Lee claims this violated his confrontation clause rights. [*Convictions affirmed*] . . .

a. The excluded evidence had minimal probative value

First, though relevant, J.W.'s prior false rape accusation had minimal probative value because it did not directly relate to an issue in the case. Rather than demonstrate a specific bias or motive to lie, which would be highly probative, the evidence invited the jury to infer that J.W. is lying because she had lied in the past.

Generally, evidence is relevant to attack a witness' credibility or to show bias or prejudice. Credibility evidence is particularly relevant when the witness is central to the prosecution's case. *See Darden*, 145 Wn.2d at 619 ("the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters"). Relevant credibility evidence may include specific instances of lying, though "their admission is highly discretionary under ER 608(b)." . . .

But evidence of a witness' prior false statement is not always relevant, particularly when that evidence is unrelated to the issues in the case. The confrontation clause primarily protects "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness *as they may relate directly to issues or personalities in the case at hand*." . . . Evidence intended to paint the witness as a liar is less probative than evidence demonstrating a witness' bias or motive to lie in a specific case. . . Here, Lee did not offer the prior false accusation evidence to demonstrate that J.W. was biased or that she had a motive to lodge a false accusation against him. Instead, he invited the jury to infer that because J.W. made a false rape accusation in the past, her accusation here must also be false. Indeed, defense counsel made this argument during closing remarks. . . .

J.W.'s prior false rape allegation bears no analogous relationship to the issues in this case. It did not demonstrate she had a motive to lie, nor did it explain other evidence in the case or cast doubt on her

ability to perceive events. Though we cannot say Lee's proffered evidence is entirely irrelevant, it has only minimal probative value.

b. The evidence was prejudicial

Like evidence of prior bad acts, evidence of a false rape accusation asks the jury to make the improper inference that because a complaining witness lied before, she must also be lying now. Our Evidence Rules are designed to prevent juries from making this inference specifically because of its potentially prejudicial effect. *See* ER 404(b). “Rule 404(b) is based upon the belief that such evidence is too prejudicial—that despite its probative value, the evidence is likely to be overvalued by the jury, and the jury is too likely to jump to a conclusion of guilt without considering other evidence presented at trial.”

c. The State's interests outweigh Lee's need for the information sought

Finally, “the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.” The State's compelling interest in encouraging rape victims to report and cooperate in prosecuting these crimes outweighs Lee's need to specify that J.W.'s prior false accusation was a rape accusation.