NO. 46145-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN RING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni Sheldon, Judge
The Honorable Amber L. Finlay, Judge

AMENDED BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his due process right to notice where the State failed to include all the essential elements for forgery in the information.

2. Where evidence was seized pursuant to a partially overbroad warrant, the trial court erred in admitting the evidence without first determining whether the searching officer was executing the valid part of the warrant when he seized the evidence.

3. There was insufficient evidence to support two of appellant's convictions for possessing stolen property.

4. There was insufficient evidence to support a conviction for trafficking stolen property.

5. There was insufficient evidence to prove the value element for a possession of stolen property charge.

6. Three of appellant's convictions for bail jumping violate the prohibition against double jeopardy.

7. The Judgment and Sentence sets forth the incorrect date of the offense for two of appellant's convictions.

Issues Pertaining to Assignments of Error

1. It has long been the case in Washington State that one of the elements of forgery is that the written instrument must be of apparent legal efficacy. The State failed to include this legal element in the information when charging appellant with three forgery offenses. Was appellant denied his due process right to proper notice of these charges?

2. Appellant was convicted of possessing a controlled substance. The evidentiary basis of this charge consisted of an aluminum can that had a residue of crystalized white powder. This can was discovered during a search of appellant's property. The search was conducted pursuant to a partially overbroad search warrant. Appellant moved to suppress the evidence. The trial court denied appellant's motion without first determining whether the controlled substance evidence was found while officers were executing the valid portion of the warrant. Did the trial court err when it denied appellant's motion to suppress the drug evidence?

3. Appellant was charged with four counts of possession of stolen property. The "to convict" instructions listed as alternatives means that defendant received, retained, possessed, or concealed stolen property. There was no unanimity instruction. As to two of

the possession counts, the State failed to provide sufficient evidence from which the jury could conclude appellant concealed the property at issue. Was there insufficient evidence to support conviction for these two charges?

4. Appellant was charged with trafficking stolen property. Under the law of this case, the State was required to prove appellant both participated in the theft of the property and was trafficking the property. Whether there was sufficient evidence to prove the trafficking element, the State failed to present evidence linking appellant to the theft of the property. Was there insufficient evidence to support the conviction for trafficking stolen property?

5. To convict appellant of first degree possession of stolen property, the State was required to prove the value of the stolen property exceeded $5,000. The State failed to prove the market value of the stolen property as to one of the charges. Was there insufficient evidence to sustain appellant's conviction?

6. Appellant failed to appear for court solely on one day. He was charged with four counts of bail jumping because he had charges pending under four separate cause numbers. Washington's bail jumping statute is ambiguous as to whether the unit of prosecution is determined by cause number, or by the number of

times the defendant fails to appear. Does the rule of lenity require the bail jumping statute be interpreted in defendant's favor thereby requiring reversal of three of his bail jumping convictions?

7. The Judgment and Sentence sets the date of the crime for two convictions as "9/28/2013." The information and instructions in this case indicate the date of the offense was September 28, 2012. Should this Court remand for correction of the Judgment and Sentence?

B. STATEMENT OF THE CASE

1. Procedural History

On October 1, 2012, the Mason County prosecutor charged appellant John R. Ring with two counts of possession of a stolen vehicle (a truck and a motorcycle) and one count of trafficking in stolen property under Cause number 12-1-00398-0. CP 103-106. That information was later amended to include an additional three counts of forgery, one count of first degree possession of stolen property (a trailer), one count of second degree possession of stolen property (various tools, a tire balance machine, irrigation pumps, and a tire mounter), and one count of bail jumping.[1]

[1] Further facts pertaining to the bail jumping charges are included below.

On October 4, 2012, the Mason County prosecutor charged Ring with one count of possession of a controlled substance under Cause No. 12-1-00406-4. CP 137. That information was later amended to include one count of bail jumping. CP 132-35.

Also on October 4, 2012, the Mason County prosecutor charged Ring with two counts of first degree possession of stolen property (a Whacker generator and a Bobcat mini-excavator) under Cause No. 12-1-00408-1. CP 163-64. That information was later amended to include another count of first degree possession of stolen property (a Kubota backhoe) and one count of bail jumping. CP 157-62.

These three cases were consolidated for trial and the jury returned its verdicts on March 4, 2014. Under Cause No. 12-1-00398-0, the jury acquitted Ring of one of count of possessing a stolen vehicle (the motorcycle) and of second degree possession of stolen property (the tools). The jury convicted him of the other charged counts. CP 24-33.

Under Cause No. 12-1-00406-4, the jury convicted Ring of both counts. CP 113-129. Under Cause No. 12-1-00408-1, the jury convicted Ring of all three counts. CP 20-23.

After this trial was completed, Ring was the subject of another trial under cause number 12-1-00407-2.[2] There, appellant was charged with one count of first degree possession of stolen property and one count of bail jumping. See, Appendix A (Information filed under cause number 12-1-00407-2). A jury convicted Ring of both charges, and he was later sentenced at the same time as this case. See, Appendix B (Judgment and Sentence filed under Cause number 12-1-00407-2).

At sentencing, the trial court found the four convictions for bail jumping constituted the same criminal conduct. CP 6. Given Ring's criminal history and his current crimes, his offender score was calculated as 14. RP 1141. The trial court sentenced him to the top of the standard range. RP 1143. Ring's conviction for trafficking garnered the longest confinement period – 83 months. CP 8. This sentence was run consecutively with a conviction under Cause No. 12-1-00407-2. RP 1148. Ring appeals. RP 150.

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[2] There are overlapping appellate issues between this appeal and appellant's appeal under case number 12-1-00407-2. Appellant has thus moved to link his two appeals so this Court may fully consider his challenge to the exceptional sentence and to three of his bail jumping convictions. Appellant also asks this Court to take judicial notice of the record in appellant's other appeal. To help facilitate this, the relevant documents from appellant's other case are attached as appendices here.

2. Substantive Facts

On September 5, 2012, Garrett Rochon contacted the Mason County Sheriff's office to report that his uncle's stolen 1968 GMC truck was listed for sale on Craigslist.com. RP 146, 380. Rochon was certain of this because the pictures accompanying the advertisement revealed the license plate number. RP 146. Rochon informed the deputy that his brother Nicholas Rochon was the legal owner of the truck and his uncle Kelly Lund was the registered owner. RP 145. The truck had been parked on Lund's property while he was in jail. RP 165. It was one of many vehicles stolen from the property during Lund's incarceration. RP 165.

Detective Jeffery Rhoades, the detective assigned to the case, discovered through the Department of Licensing that the truck was registered to John Ring, not Lund. RP 386. The phone number listed on the Craigslist ad belonged to the Ring family. RP 385

Detective Rhoades contacted the Department of Licensing and confirmed that there was an Affidavit of Loss of Title and Release of Interest filed for the truck. The document was purportedly signed by Nicholas Rochon and Kelly Lund and notarized by Sarah Griffin. The Department of Licensing also had a

bill of Sale signed by Lund and Rochon and transferring the truck to Ring. Lund later confirmed he never signed the documents. RP 157, 160.

Detective Rhoads discovered there was a notary in Washington State by the name of Sarah Griffin, but he saw that the notary stamp used on the truck documents had a different expiration date. CP 108. Rhoades also noted the notary signature on the documents did not match Griffin's driver license signature. CP 108. Griffin was contacted and confirmed she did not notarize the documents. RP 390.

Rhoades requested information from the Department of Licensing regarding all vehicles currently registered to Ring. RP 389. He noted the same suspicious notary stamp was used on the Affidavit of Loss and Release of Interest for a 1996 Chevrolet Blazer. CP 109. There was also a bill of sale that appeared to have the forged signatures of Barbara and Douglas Seeger, purported owners of the car. RP 423, 514, 519.

Rhoades also discovered suspicious paperwork for a 2001 Ford F350, also registered to Ring. CP 109. The paperwork claimed the vehicle had been gifted to Ring from Venita McBride. RP 361-62. Rhoades contacted McBride who explained she had

not gifted the car to Ring, and the car in question was parked right outside her house. CP 109. One of the documents filed was an invoice indicating that the truck was old enough to be gifted without tax consequences to the receiver. RP 361-62, 382.

Eventually, Rhoades obtained a search warrant to search Ring's property. CP 214. This was executed on September 27, 2012. RP 214. After an exhaustive 10-hour search, Lund's truck was not found on the property. RP 275, 383. Meanwhile, deputies ran the serial number of every vehicle on the property. RP 402. A motorcycle was the only vehicle seized from the property. RP 215, 387. In addition, deputies seized various tools, a tire balance machine and tire mounter, which they believed to be stolen. RP 232-38, 387. Deputies also seized a can from one of the shipping containers that had a white powdery residue. RP 244-45. It was later confirmed that the residue was methamphetamine. RP 263.

Inside one of the vehicles on Ring's property, deputies located a box of forms that included incomplete Affidavit of Loss Title and Release of Interest forms and Bill of Sale forms. RP 227-31. Some of the forms included the purported notary stamp of Sarah Griffin, while others included a suspicious notary stamp belonging to a "Paul W. Bryan." RP 227-31.

During the search of Ring's property, Rhoades interviewed Ring's wife who said Ring sometimes stores equipment at "Dean's" house. RP 384. Deputies found a paper with Dean's phone number. RP 384. Rhoades ran a check and determined that the phone number belonged to Dean Speaks. RP 385.

Rhoades obtained a warrant to search Speaks' property. RP 275, 385. The warrant was executed the next day. RP 323. Deputies found Lund's truck there. RP 276. They also seized a Bobcat excavator, a utility trailer, a Kubota backhoe tractor, irrigation pumps, and a Whacker generator. RP 277-53, 386. Speaks said Ring brought these items to his property and asked to store them there. RP 322-26. He said Ring never asked him to hide or conceal these items and did not act suspicious. RP 328-331.

As indicated in the procedural facts, the State eventually brought fifteen charges against Ring. At trial, Ring testified he had a long history of working in the auto repair business. RP 838-40. He had owned a towing business, two impound lots, and an automobile repair shop. RP 838-40. He explained that for years, he had owned the various tools, tire balancing machine and tire mounter that he was charged with stealing. Numerous other

witnesses corroborated his testimony. RP 590-600, 606, 668, 671, 687, 690-91, 749, 756, 758.

Ring also explained that he had obtained the 1968 truck from an individual who advertised it as being for sale with a sign in the window. RP 837. Ring purchased the truck by exchanging a vehicle he owned and paying some cash. RP 900. Two witnesses to the purchase corroborated this. RP 669, 674-77, 681, RP 765-767.

Ring testified he did not have any indication the truck was stolen when he purchased it. RP 859. Ring explained that prior to the purchase, the seller was struggling to find someone to notarize the necessary documents to facilitate the sale, so Ring suggested the seller go to a female notary who was living in a trailer on "Fat Pat's" property. RP 841-42. Ring had used this notary to notarize other documents, and he believed the notary was whom she purported to be, Sarah Griffin. RP 639-40, 644, RP 842, 898. This notary was also used by Ring to notarize the documents on the Chevy Blazer. RP 859. Ring denied forging any of the documents pertaining to the truck or other vehicles. RP 842-43, 861.

Ring further testified that he obtained the stolen motorcycle as a trade with Christopher Smith. RP 844. Ring explained that he

had a motorcycle that was too big for his son to ride, and Smith had a motorcycle that was too small for his child. RP 844. The two agreed to swap. RP 844. Ring's friend Don Cotton was present at the time of the trade and corroborated the swap. RP 789-90, 802. Ring testified he did not know Smith's motorcycle was stolen when he possessed it. RP 845.

Ring also testified that he picked up the other property at issue (i.e. the tractor, excavator, irrigation pumps) through third parties either at estate auctions, or from individuals offering to sell what appeared to be their personal property to raise cash. RP 845-47, 863. Ring testified he was unaware the property had been stolen. RP 879, 927-36.

Ring denied knowing about the can with methamphetamine residue found in the shipping container. RP 872. Ring said he had permitted his friend Don Cotton to live in a portion of the shipping container where the aluminum can was located. RP 849. Cotton confirmed. RP 706. Cotton also admitted he was in recovery for drug addiction and had possessed methamphetamine while on Ring's property, but then asserted his Fifth Amendment right against self-incrimination. RP 693-694.

Ring testified he never forged any of the documents at issue or a notary stamp. RP 854, 962. In support, Ring offered the testimony of Burton Wilson, who admitted he attempted to make a false notary stamp to affix to various documents while at Ring's house. RP 564-65. Wilson acknowledged that he put the fake notary stamp on some of the blank forms found in Ring's possession. RP 575. Wilson testified he acted on his own. RP 580. When Ring found out about it, he told Wilson that he could not fake a notary. RP 855.

C. ARGUMENT

I. THE INFORMATION DID NOT INCLUDE ALL THE ESSENTIAL ELEMENTS FOR FORGERY THEREBY DENYING APPELLANT OF HIS RIGHT TO DUE PROCESS.[3]

Constitutional due process requires two conditions to be met when the State charges a crime: (1) the charging document must allege the legal elements of the charged crime; and (2) it must allege sufficient facts to support every element of the crime charged. State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989). Proof of the apparent legal efficacy of the document alleged to have been forged is an essential element of forgery.

[3] This argument pertains to the three forgery counts under Cause No. 12-1-00398-0.

This element was not included in the information charging Ring. The charging document therefore failed to provide Ring with constitutionally required notice.

(i) Facts

The State charged appellant with three counts of forgery. CP 68-69. Except for specifying the date of the offense and the specific written instrument at issue, the charging language was the same for each charge and read as follows:

> In the County of Mason, State of Washington, on or about [date], the above-named defendant, JOHN R. RING, did commit FORGERY, a class C felony, in that the above-named Defendant, with intent to injure or defraud, did falsely make, or alter a written instrument, and/or did possess, utter, offer, dispose of, or put off as true a written instrument which he knew to be forged, said instrument being a [name of document]; contrary to RCW 9A.60.020(1) and contrary and against the peace and dignity of the State of Washington.

CP 68-69.

(ii) Legal Argument

Under the Sixth Amendment, a charging document is constitutionally adequate only if all essential elements of a crime, both statutory and non-statutory, are included so as to apprise the defendant of the charges against him and to allow him to prepare

his defense. See also Wash. Const. art. I, § 22; State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013).

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). Essential elements include both statutory and non-statutory elements. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). "The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." Id. at 101. A secondary purpose for the essential elements rule is to bar "any subsequent prosecution for the same offense." State v. Nonog, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (internal quotes and citation omitted).

When a defendant challenges the sufficiency of a charging document for the first time on appeal, an appellate court will liberally construe the language of the charging document in favor of validity. Kjorsvik, 117 Wn.2d at 105. "If the document [charging] cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (citation omitted).

In liberally construing the charging document, reviewing courts employ the two-pronged Kjorsvik test, asking: (1) do the necessary elements appear in any form, or by fair construction, on the face of the document; and, if so, (2) can the defendant show he or she was actually prejudiced by the unartful language. Kjorsvik, 117 Wn.2d at 105–06. If the information fails the first prong of the test, prejudice is presumed and the conviction reversed. Zilleyette, 178 Wn.2d at 162.

Here, the information failed to apprise Ring of all the essential elements of the crime of forgery. Specifically, it did not contain in any manner the legal-efficacy element.

Generally, forgery consists of three essential elements: (a) The false making or material alteration (b) with intent to defraud (c) of a writing which, if genuine, might be of legal efficacy. See, United States v. McGovern, 661 F.2d 27, 29 (3d Cir.1981) (recognizing these as the common law elements of forgery); see also, 36 Am.Jur.2d Forgery § 1 (2001) (defining "forgery" to include the same elements). The rule of legal efficacy is a common-law provision supplementing the penal statutes. State v. Smith, 72 Wn. App. 237, 241, 864 P.2d 406 (1993).

For nearly a century, Washington courts have recognized that, to be the subject of a forgery charge, a written instrument must be such that, if genuine, it would appear to have some legal efficacy, or be the basis of some legal liability. E.g., State v. Scoby, 117 Wn.2d 55, 810 P.2d 1358 (1991); State v. Morse, 38 Wn.2d 927, 929, 234 P.2d 478 (1951); Taes, 5 Wn.2d at 54; State v. Kuluris, 132 Wash. 149, 231 P. 782 (1925); State v. Richards, 109 Wn. App. 648, 653-54, 36 P.3d 1119; (2001); State v. Stiltner, 4 Wn. App. 33, 479 P.2d 103 (1971). Where the legal efficacy of the written instrument is not established, Washington courts have concluded there was no chargeable forgery crime. State v. Taes, 5 Wn.2d 51, 54, 104 P.2d (1940); State v. Stiltner, 4 Wn. App. 33, 479 P.2d 103 (1971).

When the Washington Legislature codified the crime of forgery under RCW 9A.60.020, the elements for forgery did not change. RCW 9A.60.020 provides:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
>
> (a) He or she falsely makes, completes, or alters a written instrument or;
>
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

Despite the statute's failure to explicitly set forth the legal-efficacy element, Washington courts have consistently construed this statute as continuing the practice of requiring proof of apparent legal efficacy as a legal element of forgery. E.g., Scoby, 117 Wn.2d at 57-58. Hence, the State is constitutionally required to include this essential element in the information. See, Kuluris, 132 Wash. at 151-52 (reversing where this element was not properly included in the information).

Even under a liberal construction, the information here cannot be construed as giving Ring proper notice as to the legal efficacy element. For each of the three forgery charges against Ring, the State failed to set forth the legal-efficacy element. CP 68-69. While the State set forth the statutory language, it has long been recognized that a charge of forgery requires more – it requires notice and proof as to the non-statutory legal-efficacy element. Kuluris, 132 Wash. at 151-52. Because such notice was not given here, the first prong of the Kjorsvik test is not met. Hence, reversal is required. Zillyette, 178 Wn.2d at 164.

In sum, an essential element of forgery is that the written instrument have apparent legal efficacy. This legal element does

not appear in any form in the information, thus denying Ring proper notice. Prejudice is presumed and the three forgery convictions must be reversed.

II. THE STATE FAILED TO PROVE THE OFFICERS WERE EXECUTING THE VALID PORTION OF A PARTIALLY OVERBROAD WARRANT WHEN THEY DISCOVERED THE DRUG EVIDENCE.

The evidentiary basis of the charge for possession of a controlled substance consisted of an aluminum can upon which there was a residue of crystalized white powder. This can was found during a search that was conducted pursuant to a partially overbroad warrant.

When there is a partially overbroad warrant, trial courts are required to apply the five Maddox[4] factors to determine whether the particular evidence at issue is still admissible under the severability doctrine. The trial court did not undertake this inquiry here. As shown below, when the correct legal standard is applied, it cannot be said the State met its burden of demonstrating the drug evidence was found while officers were executing the valid portion

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[4] State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

of the warrant when the evidence was found. As such, the trial court erred when it admitted the drug evidence.

(i) Facts

Detective Jeff Rhoades sought a search warrant to search Ring's property and residence. Ex. 1 ("Complaint for Search Warrant").[5] Although Rhoades alleged facts establishing probable cause to believe Ring committed possession of a stolen motor vehicle, trafficking in stolen property, possession of stolen property, and forgery, he failed to allege facts establishing probable cause to believe Ring had committed a drug offense. RP 34, 37. Despite this, Rhoades sought a warrant that not only authorized a search for specific items related to the crimes for which there was probable cause, he also sought broad authority to search for:

> 7. Any contraband (including controlled substances), fruits of crime or things otherwise unlawfully possessed, weapons or other things that which a crime has been committed or reasonable [sic] appears to be committed.

Appendix A at 6. A warrant was issued that included verbatim the above provision. Ex. 2 ("Search Warrant").[6]

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[5] Attached as appendix A.

[6] Attached as Appendix B.

The warrant was executed on September 27, 2012. CP 140. During the search, Mason County Sheriff Deputy Jason Sisson discovered an aluminum can that displayed a white crystalized residue. RP 57-58. Sisson believed it to be drug paraphernalia and collected it. RP 57-58.

Appellant moved to suppress all evidence seized under the warrant, attacking the validity of the warrant on several grounds. CP 84-96. On December 6, 2013, the trial court heard argument. RP 40-41. While the trial court found much of the warrant was supported by probable cause, it also concluded there was not probable cause to support a search for controlled substances or a broad search for contraband. RP 37-38. It ruled paragraph 7 was overbroad, struck the provision, and suppressed the drug evidence. RP 38.

Subsequently, the State moved the trial court to reconsider, asking for an evidentiary hearing on the issue. RP (2-13-14) at 2. It had previously told the court an evidentiary hearing would be required to establish facts relevant to the Maddox factors. RP 23. However, when considering the State's motion to reconsider, the trial court ignored the Maddox factors and, instead, focused the

search when he saw the drug evidence, which was beyond the valid scope of the warrant. RP 69-70.

The trial court reversed itself and denied Ring's motion to suppress the drug evidence. RP 70-72. Specifically, the trial court found: Sisson was on the property pursuant to a valid warrant to search for items related to the possession of stolen property and forgery charges; he was searching a shipping container, which "would be appropriate for [Sisson] to be looking in" if he were looking for stolen property; and Sisson immediately recognized the can to be drug paraphernalia. RP 70-72. Notably, the trial court did not apply the Maddox factors and never found that Sisson did in fact discover the drug evidence while executing the valid part of the warrant.[7] RP 70-72.

(ii) Argument

The Fourth Amendment to the U.S. Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This

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[7] As of the date of brief, it appears there are no CrR 3.6 findings filed. However, appellant believes the trial court's oral ruling is sufficient to permit appellate review. If the State files Findings and Conclusions after the filing of this brief, appellant reserves the right to challenge those findings.

amendment was designed to prohibit "general searches" and to prevent "'general, exploratory rummaging in a person's belongings.'" State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)). Similarly, article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

It is well-established that the warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of Washington's constitution require that a search warrant issue only upon a judicial determination of probable cause. State v. Fry, 168 Wn.2d 1, 5–6, 228 P.3d 1 (2010). Probable cause is established only if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability the defendant is involved in criminal activity and that evidence of the criminal activity will be found at the place to be searched. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

Additionally, "a search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." State v. Stenson, 132 Wn.2d

parties on a straight-forward application of the plain-view exception to the warrant requirement. RP (2-13-14) 3-5.

On February 19, 2014, the evidentiary hearing took place. RP 55-59. The State called just one witness – Deputy Sisson. RP 55-58. Sisson testified he found the can while searching a Conex shipping container located on Ring's property. RP 56-57.

During cross examination, defense counsel asked Sisson whether he was aware of the language in the warrant or the purpose for the search. CP 58. Sisson testified that he was not aware of the purpose or language, explaining he was just helping to process "anything illegal." RP 58-59. When specifically asked why he was in the shipping container, Sisson replied: "It was a general search, and I was assisting detectives." RP 59. When pressed as to what he was searching for in particular, Sisson stated only that he was assisting Detective Gardner. RP 59.

The State never called Detective Gardner or any other detectives who were directing the search to establish the scope and purpose of Sisson's search in the shipping container. RP 55-62.

The State argued the drug evidence came in under the plain view doctrine. RP 63. The defense countered that Sisson's testimony established that he was merely executing a general

668, 692, 940 P.2d 1239 (1997). The particularity requirement serves the dual functions of limiting the executing officer's discretion and informing the person subject to the search what items may be seized. State v. Higgs, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013) (citing State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993)). A warrant can be "overbroad" either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist. See, United States v. Spilotro, 800 F.2d 959, 963 (9th Cir.1986); Stenson, 132 Wn.2d at 692–93; Perrone, 119 Wn.2d at 545–46.

Even if a search warrant is overbroad or insufficiently particular, "[u]nder the severability doctrine, 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." Higgs, 177Wn. App. at 430 (quoting Perrone, 119 Wn.2d at 556). The doctrine applies when a warrant includes both items that are supported by probable cause and described with particularity and items that are not. Id.

In State v. Maddox, this Court held the severability doctrine allows the State to introduce evidence seized under a partially overbroad search warrant only after the following five factors are proved:

> First, the warrant must lawfully have authorized entry into the premises....
>
> Second, the warrant must include one or more particularly described items for which there is probable cause....
>
> Third, the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole....
>
> Fourth, the searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while searching for items supported by probable cause and described with particularity)....
>
> Fifth, the officers must not have conducted a general search, i.e., a search in which they flagrantly disregarded the warrant's scope.

116 Wn. App. at 807–08 (internal quotations omitted). The State bears the burden of proving the applicability of the severability doctrine and the Maddox factors. See, State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000) (holding State bears the burden of showing that an exception to the warrant requirement applies). The State failed to carry this burden.

Here, the trial court correctly found the warrant was overbroad, specifically finding there was no probable cause to support paragraph 7 which permitted a search for controlled substances and contraband. The trial court struck that paragraph. This ruling was not challenged during the second hearing. Instead, the State simply argued that the evidence was admissible under the plain view doctrine. RP 63. In doing so, it completely ignored the Maddox factors. RP 63.

Because this is a case where the warrant includes both items that are supported by probable cause and described with particularity and items that are not, the plain view doctrine must be considered within the context of the Maddox factors. See, Higgs, 177 Wn. App. at 433-434 (applying the plain view doctrine within the Maddox framework). The trial court did not consider those factors here. Hence, it erred in reversing its prior ruling and admitting the evidence without first applying the correct legal inquiry. As shown below, this error was not harmless.

Based on the record here, it cannot be said the State met its burden as to the last two Maddox factors. Under the fourth Maddox factor, the State had the burden of proving Sisson found and seized the drug evidence "while executing the valid part of the warrant"

(i.e. while searching for items supported by probable cause and described with particularity). The only officer the State called was Officer Sisson. Sisson was unfamiliar with the contents of the warrant and admitted he was merely working under the direction of detectives. RP 58-59. The State failed to call any detectives or other officers to testify to facts that established Sisson was indeed assisting in executing the valid portion of the warrant at the time he discovered the drug evidence.

Given this record, it is not surprising the trial court never found that Sisson was actually executing the valid portion of the warrant or assisting a detective who was doing so. Although the trial court found Sisson lawfully could have been in the Conex container executing the valid portion of the warrant and looking for items for which there was probable cause, it did not find Sisson was indeed executing the valid portion of the warrant at that time. Maddox requires such a finding.

Additionally, the State failed to meet its burden of proving the fifth factor (i.e. that Sisson was not conducting a general search at the time he discovered the drug evidence). Sisson testified that he was conducting a "general search." RP 59. Although he tried to qualify this by stating he was just assisting detectives (RP 59), the

State never called any detectives to establish that they were conducting anything other than a general search at the time. Once again, based on this record, it cannot be said the State meet its burden under Maddox.

In sum, the trial court correctly found the search warrant was partially overbroad. As such, the State was required to satisfy the five Maddox factors before the severability doctrine could be applied to uphold admission of the drug evidence. The State failed to carry this burden. Hence, this Court should find the trial court erred in reversing its previous decision to suppress the drug offense evidence. Moreover, because this was the only evidence supporting Ring's conviction for possession of a controlled substance, this Court should reverse that conviction.

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT TWO OF THE CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY.[8]

Appellant was charged with several counts of possession of stolen property. The "to convict" instructions specifically listed as alternative means that the defendant "received, retained, possessed, concealed" stolen property. CP 55, 61. There was no

[8] The charges at issue here are: possession of the Wacker generator under Cause No. 12-1-00408-1; and possession of the Kubota backhoe under Cause No. 12-1-00408-1.

unanimity instruction. Thus, the State was required to prove each alternative means beyond a reasonable doubt. As to two of the charges, the State failed to provide sufficient evidence that Ring concealed the property at issue.

Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. I, § 21. Where there is more than one way to commit a single offense, the jury must be unanimous that the defendant is guilty for the single crime charged. State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003) overruled on other grounds, State v. Smith, 159 Wn.2d 778, 155 P.3d 873 (2007). If one of the listed means is not supported by substantial evidence and there is only a general verdict, the reviewing court must vacate the conviction unless it can definitively determine that the verdict was founded upon one of the means supported by substantial evidence. Nicholson, 119 Wn. App. at 860. Hence, when a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether sufficient evidence supports each alternative means. State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012).

An alternative means crime categorizes distinct acts that amount to the same crime. State v. Peterson, 168 Wn.2d 763, 770,

230 P.3d 588 (2010). Possession of stolen property in the first degree is an alternative means crime. A person is guilty of this crime if he knowingly possesses stolen property that exceeds $5,000 in value. RCW 9A.56.150. The statute defines possessing stolen property as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). Accordingly, to receive, retain, possess, conceal or dispose of stolen property are alternative means of committing possession of stolen property. State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004).

Here, the jury instructions defined possessing stolen property as "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." CP 51. The to-convict instructions essentially echoed this language, setting forth as an element: "that the defendant knowingly received, retained,

possessed, concealed stolen property."[9] CP 61, 63. Consequently, there were four potential means of possession.

For purposes of appellate review, the first three means listed in the instruction (receive, retain, possess) are considered to be essentially synonymous. Lillard, 122 Wn. App. at 435. Hence, practically speaking, there are two means presented in this case: (1) to receive, retain possess; and (2) to conceal. Only the second is at issue here.

There was not substantial evidence that Ring attempted to conceal the stolen Whacker generator or the Kubota backhoe. When alternative means of committing a single offense are presented to a jury, each alternative means must be supported by substantial evidence[10] in order to safeguard a defendant's right to a unanimous jury determination. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). Turning first to the generator, it was found in plain sight on Dean Speaks' property. RP 277, 344, 386. Speaks testified that Ring had asked to store the generator and

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[9] The only means that was eliminated was disposing of stolen property.

[10] "Substantial evidence exists if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." State v. Lillard, 122 Wn. App. 422, 434, 93 P.3d 969 (2004).

other items on his property, but never asked him to hide or conceal the property. RP 328, 331. Speaks characterized his storage of the items as "pretty open." RP 328. Furthermore, the serial and VIN numbers for the generator were not altered or obliterated. RP 203, 208. There was no evidence its physical appearance was altered.[11] Indeed, a representative of the company that owned the generator was able to easily identify it from a photograph. RP 207.

Similarly, the Kubota backhoe was identifiable from a picture. The witness identifying it did not indicate any alterations to its appearance. RP 481-82, 491-92. Ring stored the tractor openly in Speaks' backyard. RP 281, 323-24, 386. There was no evidence it was covered or locked away. There also was no evidence it was physically altered in an attempt to conceal it.

Given this record, it cannot be said the State proved beyond a reasonable doubt that Ring concealed the generator or the Kubota backhoe. Given that there was no unanimity instruction, it was the State's burden to do so. Having failed to meet this burden, the two possession charges must be reversed and the charges dismissed for insufficient evidence.

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[11] Comparatively, the State produced evidence suggesting the stolen trailer and Bobcat excavator were repainted or partially stripped of identifying decals. RP 252, 504.

IV. UNDER THE LAW OF THIS CASE, THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR TRAFFICKING STOLEN PROPERTY.

Appellant was charged with trafficking stolen property in regard to Lund's 1968 GMC truck. Under the law of this case, the State was required to prove that Ring both (1) participated in the theft of the truck and (2) trafficked the truck. As shown below, there was insufficient evidence to support the first element.

Washington's trafficking statute provides:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1). Generally, this statute contemplates the State proving one of two means of committing the crime: (1) participating in the theft of the property or (2) trafficking the stolen property. State v. Owens,180 Wn.2d 90, 99, 323 P.3d 1030 (2014). In this case, however, the State charged the two means conjunctively and the jury was instructed as such. CP 50, 69. Hence, this became the law of the case and the State was required to prove beyond a reasonable doubt that Ring participated in the theft of the truck and trafficked it. RP 1036; see, State v. Hickman, 135 Wn.2d 97, 101–

05, 954 P.2d 900 (1998) (holding an extraneous element becomes the law of the case when it is included in a jury instruction). Here, there was not sufficient evidence to support conviction under the theft element.

The State presented evidence that the 1968 truck was stolen from Lund's property sometime in mid-2012. RP 147-49, 165. It was one of nine vehicles stolen off the property. RP 165. The State offered no evidence linking Ring to its theft. Despite an exhaustive search of Ring's property and his vehicles, the State offer no evidence that any of Lund's other vehicles were in Ring's possession. There was also no evidence Ring attempted to conceal the 1968 truck by altering its appearance and condition. Additionally, Ring testified as to how he purchased the truck from a third party. Compare with, Owens, 180 Wn.2d at 100 (holding sufficient evidence to uphold a trafficking conviction where the defendant failed to provide details of his claimed purchase of a car from a third party, where the State showed there was only one car stolen from the owner and defendant was in possession of it, and where the State offered evidence the defendant attempted to disguise the car).

Given this record, it is not surprising the State failed to offer any argument to the jury as to Ring's involvement in the theft of the truck. RP 1084. Indeed, the sum total of the prosecutor's argument was as follows:

> Instruction 27, and this deals with the trafficking charge. And again, the State proves that by proving that the 2008 F-150 – I'm sorry, the 1968 GMC truck that was stolen from Mr. Lund is posted on Craigslist and it's for sale. It's stolen, he knows it's stolen, and he is attempting to sell it. You'll have the Craigslist ad. You can go ahead and you can look at that.

RP 1084 (emphasis). As the prosecutor's argument demonstrates, the State never acknowledged its burden of proving Ring's participation in the original theft. Instead, it suggested that it only had to prove the truck was stolen and Ring knew that the car was stolen. However, the State's burden was greater than that – it had to prove that Ring was in fact involved in the theft of the truck. CP 69. It failed to do so.

In sum, it cannot be said – based on this record – that the State presented sufficient evidence to prove beyond a reasonable doubt that Ring stole or participated in the theft of Lund's truck. Hence, the trafficking conviction must be reversed and the charge dismissed. Hickman, 135 Wn.2d at 106.

V. THE STATE FAILED TO SUFFICIENTLY PROVE THE VALUE OF THE STOLEN PROPERTY.

The State failed to sufficiently prove the market value of the Wacker generator exceeded $5,000. Consequently, there was insufficient evidence to support the conviction.

(i) Relevant Facts

The State called only one witness to establish the value of the Wacker generator – Larry Romero, a shop foreman for Scarsella Brothers, Incorporated. RP 201. The prosecutor asked him, "What is the – the value of that particular Wacker generator?" RP 204. Romero responded, "$25,000." RP 204. There was no further testimony about the value of the generator. RP 201-212.

(iii) Legal Argument

Due process requires the State prove every element of a crime beyond a reasonable doubt. State v. Felipe Zeferino-Lopez, 179 Wn. App. 592, 599, 319 P.3d 94 (2014) (citing State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983)). A person is guilty of first degree possession of stolen property if he knowingly possesses stolen property that exceeds $5,000 in value. RCW 9A.56.150. Hence, the value of the Wacker generator was an

element of the charged crime and had to be proven beyond a reasonable doubt.

For purposes of proving possession of stolen property, value means the "market value of the property ... at the time and in the approximate area of the criminal act." RCW 9A.56.010(21)(a). "Market value is the 'price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.'" State v. Ehrhardt, 167 Wn. App. 934, 944, 276 P.3d 332 (2012) (citations omitted). Market value is based on an objective standard, not on the value to any particular person or company. State v. Shaw, 120 Wn. App. 847, 850, 86 P.3d 823 (2004).

Here, the State never offered evidence as to an objective market value for the generator. The only evidence it offered was Romero's statement that the value was $25,000. However, there is no evidence that Romero arrived at this value by first determining the market value of the stolen property. Nor is there any evidence a well-informed buyer would pay that amount.

Indeed, there is no indication how Romero arrived at a value of $25,000 given that the State failed to present any testimony as to the basis of his valuation. Given Romero's testimony, his valuation

could have been based on what a new generator would be valued at. It could also have been based on the replacement value for that generator. As this Court has held, however, evidence other than market value, such as replacement cost is not material unless the State first shows there is no market value for the particular item at issue. Ehrhardt, 167 Wn. App. at 944. And, as this record shows, the State failed to establish there was no ascertainable objective market value for the generator.

In sum, in order to convict Ring of the charged crime, the State was required to prove the market value of generator. It never proved an objective market value for this stolen property. Consequently, Ring's conviction for possession of the stolen Wacker generator must be reversed for insufficient evidence.

VI. THREE OF APPELLANT'S BAIL JUMPING CONVICTIONS VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

Ring's four bail jumping convictions constitute a single unit of prosecution and, therefore, three of his convictions violate the state

and federal constitutional guarantees against double jeopardy.[12] Reversal of the three counts challenged herein is thus required.

(i) Relevant Facts

Appellant was under court order to appear in Mason County Superior Court on January 28, 2013, but he failed to do so. Exhibits 101-33. As a result, the State charged him with four counts of bail jumping. CP 75, 135, 158; Appendix A. He was found guilty of all four counts and sentenced as such with the trial court recognizing, however, that the four charges constituted the same criminal conduct. RP 5-6, 113-12, 144-45; Appendix B.

(ii) Legal Argument

The federal and state constitutional prohibitions against double jeopardy are coextensive and protect an individual from being punished twice for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9; State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

To analyze whether a double jeopardy violation has occurred, the reviewing court must determine the unit of prosecution intended by the Legislature. State v. Adel, 136 Wn.2d

[12] Appellant is challenging all three of his bail jumping charges at issue in this case, leaving unchallenged the one conviction under cause number 12-1-00407-2 as the single valid count.

629, 634, 965 P.2d 1072 (1998). To avoid constitutional error, when a defendant is convicted for violating one statute multiple times, each conviction must be for a separate "unit of prosecution." Id. at 632.

When resolving unit of prosecution issues, the reviewing court undertakes a three-step analysis:

> [T]he first step is to analyze the statute in question. Next... review the statute's history. Finally... perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). When reviewing courts examine the relevant statute, "[t]he meaning of a plain, unambiguous statute must be derived from the statutory language." State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). If the Legislature fails to define the unit of prosecution or its intent is unclear, the rule of lenity applies and the issue is resolved in the defendant's favor. Id. at 711.

RCW 9A.76.170(1) provides:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

Division I of this Court has interpreted this statute as providing no guidance about the unit of prosecution where, as here, a person fails to surrender after one court released him under multiple orders entered under different cause numbers, each one requiring him to appear on the same day. State v. O'Brien, 164 Wn. App. 924, 929, 267 P.3d 422 (2011). The Court, therefore, found the statute is ambiguous as to whether the Legislature intended to punish the single failure to appear or the violations of multiple court orders. Id. at 930

Because the statute is susceptible to more than one reasonable interpretation, the rule of lenity applies and the ambiguity must be resolved in the Ring's favor. Id. Thus, three of Ring's bail jumping convictions violate double jeopardy. As such, this Court should reverse the three bail jumping convictions challenged herein, leaving only the single valid conviction under cause number 12-1-00407-1.

VII. THE ERRONEOUS JUDGMENT AND SENTENCE SHOULD BE CORRECTED.

Appellate courts have a duty to correct an erroneous sentence. In re Pers. Restraint of Call, 144 Wn.2d 315, 331–32, 28 P.3d 709 (2001). The Judgment and Sentence under Cause no. 12-1-00408-1 sets for the date of the crime for counts II and III as "9/28/2013." CP 144. The information and instructions in this case indicate the date of the offenses was September 28, 2012. CP 62-63; 158. As such, the sentence is erroneous as to specification of the date of the crime and this Court should remand for correction.

D. CONCLUSION

For the reasons stated above, this Court should reverse appellant's three forgery convictions due to the constitutionally deficient notice provided in the charging document.

This Court should also reverse the conviction for possession of a controlled substance because it was predicated upon evidence that was not shown to be seized pursuant to the valid portion of the partially overbroad search warrant.

Additionally, two of appellant's convictions for possession of stolen property should be reversed because the State failed to sufficiently prove all alternative means – specifically, it failed to prove

appellant concealed the property at issue. Alternatively, one of these convictions should be reversed for insufficient evidence as to the value element.

Likewise, appellant's conviction for trafficking stolen property should be reversed because there was insufficient evidence proving appellant participated in the theft.

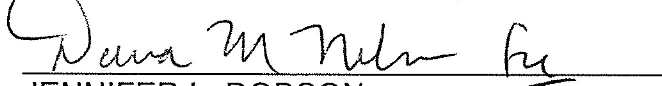
Next, appellant's three convictions for bail jumping must be reversed because they violate double jeopardy.

Finally, appellant's Judgment and Sentence contains an erroneous date of the crime and should be remanded for correction.

DATED this 13TH day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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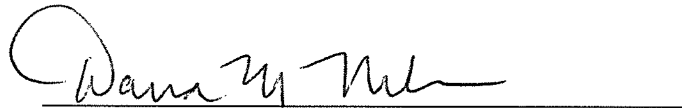

DANA M. NELSON
WSBA No. 28239
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
Respondent,	)	
vs.	)	COA NO. 46145-5-II
JOHN RING,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF NOVEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN RING
DOC NO. 866651
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF NOVEMBER, 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

November 13, 2014 - 3:03 PM

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