

FILED  
Court of Appeals  
Division II  
State of Washington  
3/8/2019 10:43 AM  
COA NO. 50293-3-II

96935-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,  
Respondent,

v.

ANTHONY GARAY,  
Petitioner.

---

---

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

Cowlitz County Cause No. 14-1-00818-7

The Honorable Stephen M. Warning, Judge

---

---

PETITION FOR REVIEW

---

Skylar T. Brett  
Attorney for Appellant/Petitioner

LAW OFFICE OF SKYLAR T. BRETT, PLLC  
P.O. Box 18084  
Seattle, WA 98118  
(206) 494-0098  
skylarbrettlawoffice@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**I. IDENTITY OF PETITIONER..... 1**

**II. COURT OF APPEALS DECISION ..... 1**

**III. ISSUES PRESENTED FOR REVIEW ..... 1**

**IV. STATEMENT OF THE CASE ..... 1**

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 4**

A. The Supreme Court should accept review and hold that equivocal evidence is insufficient, as a matter of law, to constitute proof of burglary beyond a reasonable doubt. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4). ..... 4

B. The Supreme Court should grant review and hold that the language charging Mr. Garay with trafficking in stolen property was constitutionally deficient because it omitted “critical facts.” This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4). ..... 7

**VI. CONCLUSION..... 13**

**Appendix: Court of Appeals Decision**

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>Edwards v. United States</i> , 266 F. 848 (4th Cir. 1920) .....	9
<i>Hamling v. United States</i> , 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).....	11
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	4
<i>Russell v. United States</i> , 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).....	8, 9, 10, 11, 13
<i>United States v. Cruikshank</i> , 92 U.S. 542, 23 L. Ed. 588 (1875) .....	9, 11
<i>Valentine v. Konteh</i> , 395 F.3d 626 (6th Cir. 2005).....	8, 10

### **WASHINGTON STATE CASES**

<i>City of Seattle v. Termain</i> , 124 Wn. App. 798, 103 P.3d 209 (2004).....	9
<i>State v. Greathouse</i> , 113 Wn. App. 889, 56 P.3d 569 (2002).....	9
<i>State v. Laramie</i> , 141 Wn. App. 332, 169 P.3d 859 (2007).....	12, 13
<i>State v. Larson</i> , 184 Wn.2d 843, 365 P.3d 740 (2015).....	4
<i>State v. Leach</i> , 113 Wn.2d 679, 782 P.2d 552 (1989) .....	10, 12, 13
<i>State v. Mace</i> , 97 Wn.2d 840, 650 P.2d 217 (1982) .....	6, 7
<i>State v. Mason</i> , 170 Wn. App. 375, 285 P.3d 154 (2012) .....	12, 13
<i>State v. Portee</i> , 25 Wn.2d 246, 170 P.2d 326 (1946) .....	6, 7
<i>State v. Rivas</i> , 168 Wn. App. 882, 278 P.3d 686 (2012) <i>review denied</i> , 176 Wn.2d 1007, 297 P.3d 68 (2013).....	8, 10
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	4, 6
<i>State v. Winings</i> , 126 Wn. App. 75, 107 P.3d 141 (2005) .....	12, 13

*United States v. Hess*, 124 U.S. 483, 8 S.Ct. 571, 31 L.Ed. 516 (1888)... 11

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI ..... 8, 11, 13

U.S. Const. Amend. XIV ..... 4, 8

Wash. Const. art. I, § 22..... 8

Wash. Const. art. I, § 3..... 8

**STATUTES**

RCW 9A.52.025..... 5

RCW 9A.56.140..... 5

**OTHER AUTHORITIES**

RAP 13.4..... 4, 7, 8, 13

RAP 2.5..... 10, 13

**I. IDENTITY OF PETITIONER**

Petitioner Anthony Garay, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

**II. COURT OF APPEALS DECISION**

Anthony Garay seeks review of the Court of Appeals unpublished opinion entered on February 6, 2019. A copy of the opinion is attached.

**III. ISSUES PRESENTED FOR REVIEW**

**ISSUE 1:** In order to support a conviction for residential burglary, the state must prove that the accused entered into or unlawfully remained inside a residence. Did the state present insufficient evidence to convict Mr. Garay of residential burglary when there was no evidence that he was ever in or anywhere near the premises from which some items were stolen, but merely possessed some of the stolen items later?

**ISSUE 2:** An Information charging a theft-related offense must “clearly” charge the accused with a crime relating to “specifically described property.” Was the charging language related to the Trafficking in Stolen Property offenses in Mr. Garay’s case constitutionally deficient when it did not include any language describing the stolen property in which he allegedly trafficked?

**IV. STATEMENT OF THE CASE**

One morning, Jeri Dagleish woke up to find that her house had been burglarized. RP 260-61. Her laptop computer, several video games,

a Nook e-reader, a “Kettle 1” backpack, and a blanket with the Eiffel Tower printed on it were all gone. RP 261. The burglars had also taken her three limited edition, commemorative Seahawks bottles of Maker’s Mark bourbon. RP 255-56, 261.

Ms. Dalglish did not see anything unusual or have any idea who had broken into her home. RP 264, 276. She had no surveillance footage of her home. RP 276. She reported the crime to the police, but the officers did not canvas the neighbors to ask if they had seen anyone nearby at the time of the burglary. RP 336, 338.

Using a pawn database, the police eventually learned that Anthony Garay had sold the Maker’s Mark bottles from Ms. Dalglish’s home to a pawnshop. RP 306-16. A warrant search also turned up Ms. Dalglish’s backpack and Eiffel Tower blanket in Mr. Garay’s bedroom. RP 288. The police never found Ms. Dalglish’s laptop or any of the other missing items. RP 274.

The police arrested Mr. Garay and charged him with residential burglary and two counts of trafficking in stolen property.<sup>1</sup> CP 21-23.

---

<sup>1</sup> Mr. Garay was also charged with and convicted of bail jumping, but that offense is not relevant to any of the issues on appeal. CP 22, RP 473. He was also convicted of second degree burglary and third degree theft, but those convictions were reversed by the Court of Appeals. CP 21-23; Opinion, pp. 5-9.

The state originally charged Mr. Garay with trafficking in specific items: “commemorative bottles,” “game systems, games, and/or controllers,” and “tools.” CP 12-13. But the Information was later amended to omit two of the original four counts of trafficking in stolen property. CP 21-22. The new charging language did not specify what items Mr. Garay was alleged to have trafficked. CP 22.

At trial, the state did not present any evidence that Mr. Garay had ever been in either Ms. Dalglish’s home. *See RP generally.* There was no fingerprint or other forensic evidence, no surveillance footage, and no witness who had seen Mr. Garay in the area at the time of the burglary. *See RP generally.*

The state presented evidence that Mr. Garay lived about three blocks away from the Dalglish homes, but there was no evidence that he was in the neighborhood or even in town on the dates of the burglaries. RP 303.

A police officer testified that someone using Mr. Garay’s phone number had posted an ad on Craigslist attempting to sell Marker’s Mark bottles similar to those belonging to Ms. Dalglish in the early morning of the date of the burglary on her home. RP 329-334; Ex. 15-17. The police tried to contact the number to set up a “buy” of the bottles but got no response. RP 298.

The jury found Mr. Garay guilty of all of the charges. RP 472-72.

Mr. Garay timely appealed. CP 85. The Court of Appeals affirmed his convictions for residential burglary and trafficking in stolen property.

*See* Opinion.

## **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

A. The Supreme Court should accept review and hold that equivocal evidence is insufficient, as a matter of law, to constitute proof of burglary beyond a reasonable doubt. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Evidence is insufficient to support a conviction if, taking the evidence in the light most favorable to the state, no rational jury could have found each element proved beyond a reasonable doubt. *State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015).

The requirement that the state prove each element of an offense beyond a reasonable doubt is a bedrock principle of due process. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV. A fact is not proved beyond a reasonable doubt if the state presents only equivocal evidence, which could point to either guilt or innocence. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013).

In order to convict Mr. Garay of residential burglary, the state was required to prove that he “unlawfully entered” into Ms. Dagleish’s house.



RCW 9A.52.025. But the state failed to demonstrate that he was ever in Mr. Dalglish's home or even ever on her block. *See RP generally.*

The evidence that Mr. Garay possessed some of the property that had been stolen from Ms. Dalglish's was almost certainly sufficient to prove that he was guilty of possession of stolen property. *See RCW 9A.56.140.* But the state did not charge him with that offense. CP 21-22.

Even so, the Court of Appeals affirmed Mr. Garay's conviction for residential burglary, reasoning that the evidence that he had possessed the Maker's Mark bottles a few hours after the break-in "could support the inference that he was near the scene of the crime and in possession of the stolen property soon after the residential burglary." Opinion, p. 9.

Note that Mr. Garay's presence "near the scene of the crime" was drawn from the conclusion that he could have been *in his own home* on the night of the burglary. Opinion, p. 9. Even under the Court of Appeals' strained reading of the evidence, the state's evidence was still insufficient to prove beyond a reasonable doubt that he had committed burglary. This is because the inference that Mr. Garay had been "near the scene of the crime" and in possession of the stolen bottles soon after the break-in is still insufficient to prove that he actually entered Ms. Dalglish's home.<sup>2</sup>

---

<sup>2</sup> The state did not charge Mr. Garay as an accomplice or ever contend that he had aided or abetted anyone else in the commission of the burglary. CP 21-22.

Even if it had been proved by direct evidence, the fact of Mr. Garay's presence near the scene of the burglary and his possession of the bottles later that night could just have easily demonstrated that someone else had committed the burglary without Mr. Garay's knowledge and had then "stashed" the bottles at his apartment, sold them to him, or given them to him. The evidence was equivocal at best. Accordingly, it was insufficient to constitute proof beyond a reasonable doubt as a matter of law. *Vasquez*, 178 Wn.2d at 14.

In affirming Mr. Garay's residential burglary conviction, the Court of Appeal relied heavily on this Court's prior decision *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982). Opinion, pp. 6-10.

In *Mace* this Court reversed a conviction for second degree burglary because the state had proved only that the accused possessed property that had been recently stolen from a building. *Mace*, 97 Wn.2d at 843. In *dicta*, however, the Court said that "a case is made for the jury" if, *inter alia*, the state also presents evidence that the accused had been near the scene of the burglary. *Id.* (citing *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946)).

Having concluded that Mr. Garay could have been near the scene of Ms. Dagleish's house (because he could have been in his own home

three blocks away), the Court of Appeals reasoned that the evidence was sufficient to support a burglary conviction under *Mace*. Opinion, p. 9.

But, in addition to constituting *dicta*, the rule that the *Mace* court recited was not from a case deciding whether burglary had been proved beyond a reasonable doubt. *Id.* Rather the *Mace* court quoted the 1946 decision in *Portee*, which decided only that the state had made a *prima facie* showing of the elements of burglary in order to overcome a motion for a directed verdict. *Id.* (citing *Portee*, 25 Wn.2d at 249).

The *Portee* rule is inapplicable to the question of whether the state proved Mr. Garay's guilt beyond a reasonable doubt. *Id.* The Court of Appeals erred by relying on that reasoning to affirm Mr. Garay's conviction for residential burglary.

The question of whether equivocal evidence that a person may have been *near* a home at the time of a break-in and later possessed some of the stolen property constitutes proof beyond a reasonable doubt that s/he actually entered the home is a significant question of constitutional law and is of substantial public interest. This Court should grant review. RAP 13.4(b)(3), (4).

- B. The Supreme Court should grant review and hold that the language charging Mr. Garay with trafficking in stolen property was constitutionally deficient because it omitted "critical facts." This significant question of constitutional law is of substantial public

interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.<sup>3</sup> A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).

The charging language must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).<sup>4</sup> Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.*

---

<sup>3</sup> Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

<sup>4</sup> Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

(citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In cases involving offenses related to theft, the Information must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920); *See also United States v. Cruikshank*, 92 U.S. 542, 558, 23 L. Ed. 588 (1875).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statutes, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate

notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the nature or character of the items Mr. Garay is supposed to have trafficked or stolen. CP 21-23. Because of this, the allegations are “too vague and indefinite upon which to deprive [Mr. Garay] of his liberty.” *Id.* The Information provides neither notice<sup>5</sup> nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. The critical facts in Mr. Garay’s trafficking and theft charges cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

Even so, the Court of Appeals held that Mr. Garay waived any challenge to the constitutionality of the charging language in his case because he did not move for a Bill of Particulars. Opinion, p. 13 (*citing State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989)).

But manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). A constitutionally deficient charging document presents such an error. *Rivas*, 168 Wn. App. at 887.

---

<sup>5</sup> Indeed, the prosecution’s theory that Mr. Garay had committed theft of money from the pawnshop by selling items that were later seized by the police was far from intuitive. It is unlikely that a seasoned attorney (far less an accused person) would be able to determine what he was alleged to have stolen based on the bald assertion in the charging document even if s/he was otherwise familiar with all of the allegations in the case.

The United States Supreme Court has long held that charging document which fails to advise the accused of any of the critical facts related to the allegations against him/her is inadequate under the Sixth Amendment. *See Cruikshank*, 92 U.S. at 558; *Hamling v. United States*, 418 U.S. 87, 117–18, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *Russell*, 369 U.S. 749.

The *Hamling* court made it clear that the constitution does not permit a person to be charged with a crime using only the language of the statute:

Undoubtedly the language of the statute may be used in the general description of an offence, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence*, coming under the general description, with which he is charged.

*Hamling*, 418 U.S. at 117–18 (*quoting United States v. Hess*, 124 U.S. 483, 487, 8 S.Ct. 571, 31 L.Ed. 516 (1888) (emphasis added)).

The *Russell* court referred to this rule as a “basic principle of fundamental fairness.” *Russell*, 369 U.S. at 765.

Indeed, The U.S. Supreme Court has explicitly held that a document charging a theft offense is constitutionally deficient if it fails to “specify with some degree of certainty the articles stolen” because it does not advise the accused of the “particulars of the charge against him.” *Cruikshank*, 92 U.S. at 558.

Yet, somehow, Washington appellate courts have strayed from this basic constitutional principle by attempting to create a doctrine in which any deficiency in a charging document that fails to specify critical facts (rather than elements of an offense) of an offense is labelled as “vague,” rather than constitutionally insufficient. *See e.g. State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012); *State v. Laramie*, 141 Wn. App. 332, 340, 169 P.3d 859 (2007); *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). Such cases hold that a “vague” charging document cannot be challenged for the first time on appeal, but that the accused is required to seek correction through a motion for a bill of particulars in the trial court. *Id.*

Decisions in cases such as *Mason*, *Laramie*, and *Winings* rely on *dicta* in this Court’s decision in *Leach* for their proposition that a charging document that fails to include specific facts is merely “vague,” rather than constitutionally infirm. *See Mason*, 170 Wn. App. at 385; *Laramie*, 141 Wn. App. at 340, *Winings*, 126 Wn. App. at 84 (*all citing Leach*, 113 Wn.2d at 690–91).

But the *Leach* court did not consider any issue relating to failure to allege “critical facts” in a charging document. *See Leach*, 113 Wn.2d 679. Rather, that *Leach* court simply made an offhand statement that the accused in that case could challenge the Information for the first time on



appeal because it was constitutionally deficient, rather than “vague as to some other significant matter,” the issue could be raised for the first time on appeal under RAP 2.5(a)(3). *Id* at 690-91.<sup>6</sup>

The Court of Appeals ruling in Mr. Garay’s case reifies the error in *Mason, Laramie, and Winings* of misconstruing the *dicta* from *Leach* in a manner that directly contradicts the requirements of the Sixth Amendment, as laid out by the United States Supreme Court. This court should overrule those precedents because they violate the constitution and erode a “basic principle of fundamental fairness” enshrined in the Sixth Amendment. *Russell*, 369 U.S. at 765.

This is a significant question of constitutional law and is of substantial public interest. This Court should grant review. RAP 13.4(b)(3), (4).

## **VI. CONCLUSION**

The issues here are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

---

<sup>6</sup> Notably, the *Leach* court also held that the constitutional requirements regarding charging language are more stringent in felony cases than in those charging only misdemeanors, such as those addressed by the Supreme Court in that case. *Leach*, 113 Wn.2d at 697.

Respectfully submitted March 8, 2019.

A handwritten signature in blue ink, appearing to read "STBrett", is centered on the page. The signature is fluid and cursive, with a horizontal line extending from the end.

---

Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review,  
postage pre-paid, to:

Anthony Garay/DOC#349622  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

and I sent an electronic copy to

Cowlitz County Prosecuting Attorney  
appeals@co.cowlitz.wa.us

through the Court's online filing system, with the permission of the  
recipient(s).

In addition, I electronically filed the original with the Court of  
Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE  
LAWS OF THE STATE OF WASHINGTON THAT THE  
FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 8, 2019.



---

Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant/Petitioner

**APPENDIX:**

February 6, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GARAY,

Appellant.

No. 50293-3-II

UNPUBLISHED OPINION

BJORGEN, J.P.T.<sup>1</sup> — Anthony Garay appeals from convictions of one count of third degree theft, one count of residential burglary, one count of second degree burglary, and two counts of first degree trafficking in stolen property.

He argues that (1) the State presented insufficient evidence of theft, residential burglary, and second degree burglary, (2) the convictions for first degree trafficking in stolen property and third degree theft are barred by double jeopardy, (3) the information was deficient because it failed to allege specific facts regarding third degree theft and first degree trafficking in stolen property, and (4) the trial court improperly calculated his offender score because the State failed to prove his prior convictions. Garay also contends that imposition of the criminal filing fee and DNA (deoxyribonucleic acid) fee on him conflicts with *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), and Laws of 2018, chapter 269.

---

<sup>1</sup> Judge Thomas R. Bjorgen is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

We affirm Garay's convictions for residential burglary and first degree trafficking in stolen property, reverse his convictions for third degree theft and second degree burglary, and remand for resentencing consistent with this opinion.

#### FACTS

After going to bed on May 7, 2014, sometime between 10:30 p.m. and 11:00 p.m., Jeri Dagleish woke up the next morning between 6:00 a.m. and 6:30 a.m. to discover that her house had been burglarized. The missing items included her laptop computer, several video games, a Nook e-reader, backpacks, a blanket with the Eiffel Tower printed on it, and three limited edition commemorative Seattle Seahawk bottles of Maker's Mark bourbon.

Around 3:00 a.m. that same morning, a Craigslist advertisement for three commemorative Seahawks bottles of Maker's Mark was posted using Garay's phone number and listing "Anthony" as the contact person. Verbatim Report of Proceedings (VRP) (Vol. II) at 294-98. A few days later, Garay sold the Seahawks bottles to a pawnshop and signed a receipt declaring that he was the sole owner of the items and was selling them "free of any indebtedness or claim of any kind." VRP (Vol. III) at 401-05.

On June 11, Jason Gilliam noticed that his children's bicycles were out of place inside his garage. A few days later, he learned that his children were not responsible for their bikes being out of place. Gilliam returned to the garage to discover that he was missing several Dewalt power tools. On June 14, Garay pawned those tools at the same pawnshop where he had sold the Seahawk bottles, leaving a signed receipt warranting that the property was not stolen and that he had the right to sell the property. On June 15, Gilliam called the police to report his missing tools. Gilliam did not know exactly when the burglary took place.

Garay lived within three blocks of both Dalglish and Gilliam, but there was no evidence of his whereabouts on the dates of the burglaries. There was no fingerprint or forensic evidence, surveillance footage, or eyewitness testimony that Garay was in the area when the burglaries occurred.

On June 25, police executed a search warrant for Garay's home, where he claimed to live alone. There they found one of Dalglish's backpacks and a blanket, but none of the other missing items. When questioned, Garay stated that he had not pawned anything recently and claimed that he owned the blanket, but could not remember where, from whom, or for how much he had bought it. The blanket and backpack, along with all the stolen items found at the pawnshop, were returned to Dalglish and Gilliam. The pawnshop never recovered the money it paid Garay for those items.

The police arrested Garay, and he was charged with residential burglary, two counts of first degree trafficking in stolen property, second degree burglary, third degree theft, and bail jumping. Rather than charge Garay with third degree theft from Dalglish's home or Gilliam's garage, the State alleged he had committed theft from the pawnshop on the basis that he sold stolen items to the pawnshop and the owner never recouped the money it paid him. The State also charged Garay with residential burglary for items taken from Dalglish's home and second degree burglary for items taken from Gilliam's garage. Although the State initially charged Garay with two counts of first degree trafficking in stolen property and specified the items relating to the charges, ("commemorative bottles," "tools," etc.), the State later amended the charges without specifying which items he trafficked. Clerk's Papers (CP) at 12-13. Garay never requested a bill of particulars with regard to any charges in the amended information.

Garay's first trial ended in a mistrial. Garay was tried a second time on the same charges, and the jury found him guilty of all charges.

In addition to this case, Garay separately pled guilty to one count of eluding in another case pending sentencing. The trial court sentenced Garay on both cases at the same hearing. The court set the sentence in the other case to run concurrently with the sentence in the present appeal, and Garay agreed with the State's offender score calculation in the other case. The two cases have the same criminal history, but the case that went to trial in this matter involved multipliers due to the burglary convictions.

During sentencing, the State argued that Garay's offender score was 11 for the burglary charges and 9 for the other charges, due to alleged prior convictions. As evidence of criminal history, the State provided only a signed prosecutor's statement listing the prior convictions, along with their dates and case numbers. Garay agreed that the State's scores were correct, but noted that the corresponding criminal history information had not been updated. The only offender scoring form entered into the record was that of the trial judge. Garay did not object to his offender score of 11 for the residential burglary conviction and 9 for the other felonies and signed the judgment and sentence with those scores and sentencing ranges. The trial court ultimately sentenced Garay to 74 months on the residential burglary conviction, 74 months for each count of first degree trafficking in stolen property, 51 months for second degree burglary, 364 days for third degree theft, and 60 months for bail jumping. The court ordered all his sentences to run concurrently, for a total period of confinement of 74 months.

In addition to other matters, the sentencing court imposed the criminal filing fee and DNA collection fee on Garay. The court also found Garay indigent at the end of trial.

Garay appeals.



## ANALYSIS

### I. SUFFICIENT EVIDENCE

Garay argues that the State presented insufficient evidence of third degree theft, residential burglary, and second degree burglary. We agree with Garay and hold that the State presented insufficient evidence to support convictions for third degree theft and second degree burglary. However, we hold the State did present sufficient evidence to support Garay's conviction for residential burglary.

#### A. Legal Principles and Standard of Review

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* Circumstantial evidence and direct evidence carry equal weight. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

#### B. Theft Conviction

The State charged Garay with third degree theft for selling stolen items to the pawnshop. The State's theory is that Garay stole from the pawnshop by taking its money in exchange for stolen items that he sold without the owners' permission while representing that he was the owner, and the pawnshop was unable to recoup that money when law enforcement later seized those items. Garay argues that insufficient evidence supports his conviction of third degree theft because the State did not present evidence that he intended to deprive the pawnshop of property.

“Theft” means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). “A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value.” RCW 9A.56.050(1). “Intent to deprive” does not require intent to “permanently” deprive. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989).

We agree with Garay that the State failed to demonstrate that he had the requisite intent to deprive the pawnshop of its money. Although the State may have proved that Garay wrongfully obtained control of the pawnshop’s money by selling it stolen property while representing he was the owner, it did not present any evidence of Garay’s mental state in selling those items. “Intent to deprive” is an essential element of the offense of theft, yet there was no evidence that Garay knew, much less intended, that those items would be seized by law enforcement and the pawnshop would be unable to resell them and recoup its payment to Garay. Circumstantial evidence carries the same weight as direct evidence, but it is not clear that there was even circumstantial evidence of Garay’s intent. *See Delmarter*, 94 Wn.2d at 638.

The State also argues that by trafficking in stolen property, a crime for which he was separately convicted, Garay committed theft from the pawnshop. However, the record still lacks sufficient evidence of Garay’s intent to deprive the pawnshop of property in relation to the theft charge.

We hold there is insufficient evidence to support Garay’s conviction for theft.

C. Burglary Convictions

Garay argues that the State presented no evidence that he had ever been inside Gilliam’s garage, so there was insufficient evidence to support his second degree burglary conviction.

Garay likewise argues that insufficient evidence supports his residential burglary conviction because the State did not present any evidence that he had ever been inside Dalglish's home. Rather, Garay argues the State's evidence merely shows that he possessed some of the stolen property soon after the burglaries and that he lived nearby. We agree that the State presented insufficient evidence to support Garay's conviction for second degree burglary, but conclude the State presented sufficient evidence to support his conviction for residential burglary.

To convict Garay of second degree burglary regarding Gilliam, the State must prove beyond a reasonable doubt that he entered or remained unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). To convict Garay of residential burglary regarding Dalglish, the State must prove beyond a reasonable doubt that he entered or remained unlawfully in a dwelling with the intent to commit a crime against a person or property therein. RCW 9A.52.025.

“In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein.” RCW 9A.52.040. “[P]roof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary.” *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). To support a burglary conviction, the State must also show at least slight corroborative evidence of other inculpatory circumstances. *Id.* Such inculpatory circumstances include the presence of the accused near the scene of the crime, flight, improbable or inconsistent explanations, possession of a forged bill of sale, the giving of fictitious names, or circumstantial proof of entry. *Id.*; *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946).

Garay contends that there is insufficient evidence to support his convictions for second degree burglary and residential burglary because the State presented no evidence that he had ever been inside Gilliam's garage or Delgleish's home. Garay asserts the State's evidence merely shows that he possessed some of the stolen property soon after the burglaries and that he lived nearby.

1. Second Degree Burglary

With respect to the second degree burglary conviction, we agree with Garay. The State demonstrated that Garay was in possession of Gilliam's power tools when he sold them to the pawnshop, but that sale occurred several days after the presumptive date of the burglary (the day Gilliam discovered the bicycles had been moved around in the garage). In fact, Gilliam did not know when exactly the burglary took place, so it is impossible to determine whether Garay was anywhere near the scene of the crime at the time it was committed. The State presented no evidence that Garay was ever physically near the scene of the crime, let alone in Gilliam's garage, other than simply that he lived a few blocks away.

The only remotely corroborative evidence is the fact that Garay denied having pawned anything recently when questioned by police, despite having signed a receipt claiming good title to the tools when he sold them at the pawnshop. But all this evidence corroborates is the fact that Garay sold stolen property to the pawnshop, which is not in dispute.

The State analogizes this case to *Portee*. In that case, there was sufficient evidence for a conviction where the defendant (1) pawned the stolen property as his own the same afternoon as the burglary, (2) gave a fictitious name and address, and (3) provided an explanation for his possession of the stolen property that a jury could reasonably have regarded as improbable. *Portee*, 25 Wn.2d at 254. Here, unlike in *Portee*, Garay (1) pawned the stolen property at least

several days after the burglary, (2) truthfully provided his full name and address at the pawnshop, and (3) stated only that he had not pawned anything recently, but did not provide any improbable explanations for his possession of the tools.

Garay's denial of having pawned anything recently, on its own, does not constitute sufficient corroborative evidence. The mere fact that Garay was in possession of the power tools, without other evidence of his presence near the crime scene or other inculpatory circumstances, is insufficient to support a conclusion that he actually entered Gilliam's garage, a necessary element for a burglary conviction. *See Mace*, 97 Wn.2d at 845.

We hold that the State presented insufficient evidence to support Garay's conviction for second degree burglary.

## 2. Residential Burglary

Turning to Garay's residential burglary conviction, the State has marshaled more substantial evidence of inculpatory circumstances. Although there is no evidence that Garay was physically present near Dalglish's house, his Craigslist post suggested that he was in possession of the Seahawk bottles mere hours after the burglary took place. This, combined with the proximity of his residence to Dalglish's house, could support the inference that he was near the scene of the crime and in possession of the stolen property soon after the residential burglary.

Furthermore, when questioned by police as to why he was in possession of Dalglish's blanket, Garay gave the improbable explanation that he owned it but could not remember where, from whom, or for how much he had bought it. Taken together with proof of his possession of the stolen property, in the light most favorable to the State, this evidence of inculpatory circumstances is sufficient for a rational juror to find the elements of residential burglary beyond a reasonable doubt.

We hold the State presented sufficient evidence to support Garay’s conviction for residential burglary.

## II. DOUBLE JEOPARDY

Garay argues that the trial court violated his right to be free from double jeopardy by entering convictions for both trafficking in stolen property and theft. Because we reverse his theft conviction, we need not reach this claim.

## III. THE INFORMATION

Garay argues that the information is constitutionally deficient in its charges of first degree trafficking and third degree theft. Because we reverse and vacate his third degree theft conviction, we do not consider the adequacy of the information with respect to that charge. With respect to the trafficking charge, we hold that it was not deficient.

### A. Legal Principles and Standard of Review

We review a challenge to the sufficiency of an information de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007); *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012). An information must allege essential statutory and non-statutory elements of a crime, providing the defendant with sufficient notice of “the nature and cause of the accusation against him.” *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)); U.S. CONST. amend. VI; WASH. CONST. art. I, § 22). To satisfy this requirement, the information must allege (1) “every element of the charged offense” and (2) “particular facts supporting them.” *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010). In other words, the information must “allege facts supporting every element of the offense, in addition to adequately identifying the crime charged.” *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). “These legal and factual requirements are designed to give the

defendant adequate notice of the charges so that he or she may prepare a defense.” *Rivas*, 168 Wn. App. at 887.

While the information must include the “essential elements” of the crime charged, it is not required to allege “specific facts” beyond those required to support each element of the crime. *State v. Laramie*, 141 Wn. App. 332, 338, 340, 169 P.3d 859 (2007). A failure to allege specific facts “may render the charging document vague, but it is not constitutionally defective.” *Id.* at 340. A vague information “may be corrected under a bill of particulars.” *Leach*, 113 Wn.2d at 687. Where a defendant fails to request a bill of particulars at trial, he waives any challenge to the information for vagueness. *State v. Mason*, 170 Wn. App. 375, 385, 285 P.3d 154 (2012).

When, as here, a defendant challenges an information’s sufficiency for the first time on appeal, we construe the document liberally in favor of validity. *Rivas*, 168 Wn. App. at 887. We examine the information as a whole to determine whether the essential elements appear in any form or can be found by any fair construction, and whether the defendant was prejudiced by the inartful language. *State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). If we “can neither find nor fairly imply an essential element of the crime in the charging document,” prejudice is presumed and reversal is required. *Rivas*, 168 Wn. App. at 888. This is true even if the defendant had actual knowledge of all of the essential elements of the crime charged against him. *Id.*

B. The Information Was Not Deficient

A person is guilty of first degree trafficking in stolen property if he or she “knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property.” RCW 9A.82.050.

The information, in relevant part, consisted of the following language:

COUNT II—TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE

The defendant, in the County of Cowlitz, State of Washington, on or about 05/12/2014, did knowingly initiate, organize, plan, direct, or supervise the theft of property for sale to others, or did knowingly traffic in stolen property, contrary to RCW 9A.82.050(1) and against the peace and dignity of the State of Washington.

.....

COUNT IV—TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE

The defendant, in the County of Cowlitz, State of Washington, on or about 06/14/2014, did knowingly initiate, organize, plan, direct, or supervise the theft of property for sale to others, or did knowingly traffic in stolen property, contrary to RCW 9A.82.050(1) and against the peace and dignity of the State of Washington.

CP at 22.

Garay argues the information omitted “critical facts” because it did not specifically detail which stolen items he trafficked. Br. of Appellant at 16. But the information is not required to contain critical facts. *Laramie*, 141 Wn. App. at 340. It need only include the essential elements of the crime and the facts that support them “in any form” or that “can be found by any fair construction.” *Brown*, 169 Wn.2d at 198.

Garay does not allege that the information failed to include essential elements. The information mirrors the language of every statutory element enumerated in RCW 9A.56.050(1)(a) and identifies the dates on which Garay was accused of trafficking in stolen property. Indeed, the fact that each trafficking count provides a different, specific date suggests that Garay had sufficient notice of “the nature and cause of the accusation against him.” *Zillyette*, 178 Wn.2d at 158 (quoting *Kjorsvik*, 117 Wn.2d at 97). Further, because Garay did not object to the information, we construe it liberally in favor of validity. *Rivas*, 168 Wn. App. at 887.



For these reasons, we hold that the information was not constitutionally deficient. In addition, because Garay failed to request a bill of particulars at trial, he has waived any challenge that the information was vague. *See Leach*, 113 Wn.2d at 687.

#### IV. OFFENDER SCORE

Garay argues that the trial court improperly calculated his offender score because the State failed to prove his prior convictions. We agree.

##### A. Legal Principles and Standard of Review

Following a conviction, the sentencing court must determine a defendant's offender score, which is calculated based on the defendant's current offenses and prior convictions. RCW 9.94A.525, .530(1). Challenges to the offender score calculations may be raised for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). We review de novo a sentencing court's calculation of an offender score. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

##### B. Establishment of Criminal History

In order to establish a defendant's criminal history for sentencing purposes, the State must prove a defendant's prior convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). The best evidence of a prior conviction is a certified copy of the judgment and sentence, but the State also may produce other comparable documents or transcripts from prior hearings to prove prior convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Bare assertions by the State fail to meet this burden; it must introduce "evidence of some kind to support the alleged criminal history." *Hunley*, 175 Wn.2d at 910 (quoting *Ford*, 137 Wn.2d at 480).

The State can also meet its burden if the defendant affirmatively acknowledges the criminal history on the record. *Id.* at 912. However, the “mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgement.” *Id.* “Nor is a defendant deemed to have affirmatively acknowledged the prosecutor’s asserted criminal history based on his agreement with the ultimate sentencing recommendation.” *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009). There is a “need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing.” *Id.*

The State did not prove Garay’s offender score by a preponderance of the evidence. The only evidence submitted was the prosecutor’s “statement of defendant’s criminal history” and oral recitation of Garay’s history. CP at 16. *Hunley* held that the State’s unsworn and unsupported criminal history summary was insufficient to prove prior offenses because “a prosecutor’s assertions are neither fact nor evidence, but merely argument.” *Hunley*, 175 Wn.2d at 912 (quoting *Ford*, 137 Wn.2d at 483 n.3). The *Hunley* court held RCW 9.94A.500(1) to be unconstitutional as applied, “insofar as it allows a prosecuting authority to establish the existence and validity of a defendant’s prior convictions with an unsupported criminal history summary from the prosecutor.” 175 Wn.2d at 917.

That the State in this case offered a sworn summary does not cure the deficiency of a lack of supporting evidence, as it is not comparable to a certified copy of a judgment and sentence. In *In re Personal Restraint of Adolph*, our Supreme Court held that a Department of Licensing driving record abstract and criminal history summary generated by a judicial case management database system met the preponderance of evidence standard. 170 Wn.2d 556, 569-70, 243 P.3d 540 (2010). The court reasoned that those documents are

comparable to a certified judgment and sentence because they are official government records, based on information obtained directly from the courts, and can be created or modified only by government personnel following procedures established by statute or court rule.

*Id.* at 570. The State's sworn summary in this appeal has none of these characteristics. Because it is unsupported by other documents of record or transcripts of prior proceedings, it still amounts only to "merely argument" and so falls short of the preponderance of the evidence standard. *See Hunley*, 175 Wn.2d at 912; *State v. Vickers*, 148 Wn.2d 91, 120, 59 P.3d 58 (2002).

The State argues that Garay agreed that his criminal history, offender scores, and sentencing ranges were correct and it therefore was not required to prove his criminal history. Garay, however, neither signed the statement of his criminal history nor affirmatively acknowledged that history. Although he did acknowledge the accuracy of the State's offender score calculation, this does not amount to an affirmative acknowledgment of criminal history.

In *Mendoza* the State argued that the defendants stipulated to their criminal history by acknowledging the prosecutor's statement of criminal history and recommending a sentence in the range calculated by the prosecuting attorney. 165 Wn.2d at 925-26. The court rejected that argument because the defendants "did nothing *affirmative* with respect to their criminal histories. And the sentencing courts below did not have any *facts or information* on which to find by a preponderance of the evidence that the criminal history was valid." *Id.* at 929

In this case, the only evidence of agreement to or acknowledgment of criminal history is the transcript of the presentence discussions between Garay, the State, and the trial court. In these, the attorneys orally agreed on offender scores and Garay's attorney acknowledged that he never received updated criminal history sheets. While this exchange may suggest a mutual understanding of Garay's criminal history, Garay did nothing affirmative to signal his acknowledgment of the facts and information introduced for the purposes of sentencing. *See*

*Mendoza*, 165 Wn.2d at 929.<sup>2</sup> The State, therefore, failed to show that Garay affirmatively acknowledged his criminal history.

We accordingly hold that the State failed to prove Garay's prior convictions by a preponderance of the evidence. For this reason, and because our vacation of his third degree theft and second degree burglary convictions may affect Garay's offender score, we vacate his sentence and remand for resentencing. On resentencing, the court may consider new evidence consistently with *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014).

#### V. LEGAL FINANCIAL OBLIGATIONS

In supplemental briefing, Garay contends that the trial court's order imposing the criminal filing fee and DNA fee on him conflicts with *Ramirez* and Laws of 2018, chapter 269. In its supplemental brief in response, the State agrees.

We agree with the parties' reading of *Ramirez* and Laws of 2018, chapter 269. Therefore, on remand the sentencing court shall not impose the criminal filing fee or the DNA collection fee.

#### CONCLUSION

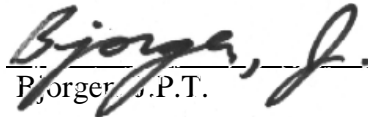
We affirm Garay's convictions of residential burglary and first degree trafficking in stolen property, but reverse his convictions of third degree theft and second degree burglary. We remand for resentencing in accordance with this opinion. On resentencing, the court shall

---

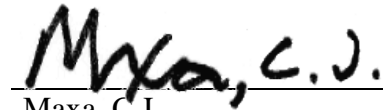
<sup>2</sup> *State v. Jones*, 182 Wn.2d 1, 7, 338 P.3d 278 (2014), disapproved of *Mendoza* to the extent it could be read as prohibiting additional relevant evidence of criminal history at resentencing following remand from appeal or collateral attack. That is not the issue in the present appeal.


require adequate proof of criminal history and shall not impose the criminal filing fee or the DNA collection fee.

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

  
Bjorge, J.P.T.

We concur:

  
Maxa, C.J.

  
Lee, J.

# LAW OFFICE OF SKYLAR BRETT

March 08, 2019 - 10:43 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50293-3  
**Appellate Court Case Title:** State of Washington, Respondent v Anthony J. Garay, Appellant  
**Superior Court Case Number:** 14-1-00818-7

### The following documents have been uploaded:

- 502933\_Petition\_for\_Review\_20190308104238D2267881\_8873.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was Garay Petition for Review.pdf*

### A copy of the uploaded files will be sent to:

- appeals@co.cowlitz.wa.us
- nguyenm@co.cowlitz.wa.us

### Comments:

---

Sender Name: Valerie Greenup - Email: valerie.skylarbrett@gmail.com

**Filing on Behalf of:** Skylar Texas Brett - Email: skylarbrettlawoffice@gmail.com (Alternate Email: valerie.skylarbrett@gmail.com)

Address:  
PO Box 18084  
Seattle, WA, 98118  
Phone: (206) 494-0098

**Note: The Filing Id is 20190308104238D2267881**