

640682

640682

NO. 64068-2-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JOSEPH DAVID MASSINGALE,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Joseph Massingale was convicted of possession of stolen motor vehicle and vehicle prowl tools. On appeal Massingale claims there was insufficient evidence to support conviction, the trial erred in giving defense instructions, the prosecutor's arguments were misconduct and the trial court erred in failing to consider a Drug Offender Sentencing Alternative (DOSA).

The State contends among other evidence, the defendant's flight and timing of the theft as well as the tools to steal a vehicle support the charges. The defense proposed instructions are subsumed within the State's burden of proof. There was no misconduct in closing argument and since there was also no objection, the actions were not so flagrant and ill-intentioned as to merit reversal. And, finally, since the trial court actually on its own motion continued the case to consider the DOSA sentence, there was no abuse of discretion.

II. ISSUES

1. Where the defendant drove off in a stolen vehicle when he saw an officer and fled the vehicle after abandoning it with motor vehicle theft tools inside, was there sufficient evidence

for a rational trier of fact to find the defendant knowingly possessed a stolen motor vehicle?

2. Where there was damage to a door lock and ignition and tools inside the stolen vehicle which were capable of damaging the vehicle and starting it, there was sufficient evidence to find a defendant guilty of possession of motor vehicle theft tools.
3. Where the defense proposed instruction are part of the State's burden of proof, did the trial court did err in denying the instructions?
4. Did the prosecutor shift the burden of proof in closing argument?
5. Did the prosecutor suggest that in order to acquit, the jury must find the officers lied?
6. Did the prosecutor present improper argument regarding the motor vehicle theft tools which was not supported by the evidence?
7. Since the defendant did not object, were any of the prosecutor's arguments so flagrant and ill-intentioned as to merit reversal?

8. Where the trial court continued the case to gather information and consider as DOSA, was there an abuse of discretion in denying DOSA?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On December 18, 2008, Joseph Massingale was charged with Taking a Motor Vehicle without Permission in the First Degree and Making or Possession of Motor Vehicle Theft Tools alleged to have occurred on December 17, 2008. CP 1-2.

On February 10, 2009, the State amended the charge of Taking a Motor Vehicle without Permission in the First Degree to Possession of Stolen Motor Vehicle. CP 6-7.

On June 1, 2009, Massingale's trial began. 6/1/09 RP 3.¹

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

5/6/09 RP	Motion Hearing
5/7/09 RP	Motion Hearing (begins at page 40)
5/27/09 RP	Motion Hearing (begins at page 50)
6/1/09 RP	Trial Day 1 (motions in limine)
6/2/09 RP	Trial Day 2 (testimony, begins at page 15)
6/3/09 RP	Closing Argument
7/9/09 RP	Sentencing Hearing (continued) (begins at page 93)
8/13/09 RP	Sentencing (completed).

On June 3, 2009, the jury returned verdicts finding Massingale guilty of Possession of Stolen Motor Vehicle and Possession of Motor Vehicle Theft Tools. CP 87-8.

On July 9, 2009, the case was first set for sentencing. 7/9/09 RP 93. Massingale did not dispute his criminal history at sentencing. 7/9/09 RP 95. Massingale's defense counsel initially requested a sentence at the low-end of the range of 43 months. 7/9/09 RP 95. During comments Massingale's counsel pointed out that he had been in treatment for chemical dependency. 7/9/09 RP 96-7. After hearing from family of the defendant and Massingale himself that he had a chemical dependency problem, the trial court on its own raised the issue of a Drug Offender Sentencing Alternative (DOSA) sentence. 7/9/09 RP 105. The trial court on its own motion continued the sentencing over to request a presentence report from the Department of Corrections to see if a DOSA sentence would be appropriate. 7/9/09 RP 105-6, CP 157-8/

On August 10, 2009, the Department of Corrections filed a DOSA/Risk Assessment Report from the Department of Corrections. CP 174-9. That report did not recommend a DOSA sentence. CP 178.

On August 13, 2009, Massingale was sentenced. 8/13/09 RP 3. At the hearing the trial court chose to impose a sentence at the middle of the standard range of 49 months of prison time. 8/13/09 RP 11. The trial court denied the stay of sentence pending appeal. 8/13/09 RP 14.

On August 13, 2009, Massingale timely filed a notice of appeal. CP 159-60.

2. Summary of Trial Testimony

Tyler Call was using his father's blue 1993 Acura Integra on December 7, 2008. 6/2/09 RP 29. Tyler left the vehicle in an alley behind a bar and was gone for twenty minutes. 6/2/09 RP 30. When he returned, the car was missing. 6/2/09 RP 30. He called his father then flagged down Sergeant Dougher of the Sedro Woolley Police Department to report the vehicle missing. 6/2/09 RP 30. In the vehicle were about \$170 in cash, DVDs, shoes, a Domino's Pizza uniform and a phone charger. 6/2/09 RP 32.

When Tyler last had the vehicle, there were no problems with the doors or the ignition to the vehicle. 6/2/09 RP 31. After the vehicle was recovered, Tyler found out that the passenger lock did not work because the key could not be inserted and the ignition hung up and would catch when he tried to start the vehicle. 6/2/09 RP 34.

Those problems were not there prior to his vehicle being stolen.
6/2/09 RP 34.

The cash, shoes, and DVDs were missing when the vehicle was recovered. 6/2/09 RP 32. Tyler was shown a bag of tools including a screwdriver and a file and a bag of clothing that did not belong to him. 6/2/09 RP 32-4. There had been a spare key in the driver's door of the vehicle, but Tyler did not look for it. 6/2/09 RP 38.

Tyler's father, Melvin Call, testified that he signed the vehicle stolen on December 7, 2008, after being contacted by his son and the officers. 6/2/09 RP 39-41. His son had called him around 1:30 a.m. to let him know the vehicle had been stolen. 6/2/09 RP 40. Melvin did not recognize any of the tools that had been recovered from the vehicle. 6/2/09 RP 42-3.

Sergeant Melissa Dougher of the Sedro Woolley Police Department was working on December 7, 2008, at about 1:30 a.m. when she was flagged down by Tyler Call. 6/2/09 RP 23-4. Tyler reported his father's vehicle had been stolen to her. 6/2/09 RP 24. Tyler's father came and signed a stolen vehicle report allowing the vehicle to be entered into state and national databases. 6/2/09 RP 25. Sergeant Dougher looked for the vehicle in the city during the remainder of her shift, but did not locate it. 6/2/09 RP 27.

Ten days later on December 17, 2008, Deputy Brad Holmes of the Skagit County Sheriff's Office was on duty and noticed a suspicious vehicle while he was at a local convenience store at about 1:50 a.m.. 6/2/09 RP 44-5. As Holmes walked out of the store, a vehicle pulled into the parking lot and appeared to start to go to the gas pumps. 6/2/09 RP 45. When the occupants looked up and looked at Holmes, the vehicle rapidly accelerated and exited out of the parking lot. 6/2/09 RP 45. It seemed obvious to Holmes that both the driver and passenger looked directly at Holmes and changed their plans accelerating out of the parking lot when they saw him. 6/2/09 RP 45-6. Holmes saw two occupants in the vehicle and described their appearance. 6/2/09 RP 53. Holmes identified a video from the convenience store which showed the blue Acura arriving then accelerating away as Holmes came out. 6/2/09 RP 48-9

Holmes looked at the license plate, went to his patrol car and checked in the computer system. 6/2/09 RP 46. The vehicle showed as stolen out of Sedro Woolley and not recovered. 6/2/09 RP 46. Deputy Holmes tried to catch up to the vehicle. 6/2/09 RP 75. It had been snowing that night and there was fresh snow on the ground. 6/2/09 RP 75. Holmes saw only one set of tire tracks leaving the parking lot on to the highway. 6/2/09 RP 75. Holmes followed the

tracks down the highway to where the vehicle went onto a side street and traveled a distance before pulling around a corner and stopping in front of a residence. 6/2/09 RP 77.

When Holmes approached the vehicle there was no one inside but there were two separate sets of footprints in the snow leaving the vehicle. 6/2/09 RP 77-8, 102-3. Holmes testified the footprints cut across the yard and headed east. 6/2/09 RP 77. Holmes waited for a Sedro Woolley officer to arrive and they followed the footprints across a couple of yards before heading to a residence on Laurel Drive. 6/2/09 RP 80. The footprints led to a door of the residence where they turned around and left northbound. 6/2/09 RP 80. The residents at the address had not spoke with anyone or let anyone inside. 6/2/09 RP 80-1. Holmes returned to his vehicle while a Sedro Woolley Officer continued to follow the tracks. 6/2/09 RP 81. The tracks led officers away from the vehicle, over a fence, across a field of deeper snow and west on a trail. 6/2/09 RP 82. The footprints led on different roads and forty to fifty yards into a trailer court before ending at space 37 in the trailer court. 6/2/09 RP 83-4. The footprints led up to what appeared to be the front door of the trailer and ended showing that two people had entered. 6/2/09 RP 84-5. Holmes and the Sedro Woolley officers tried to make contact

with the occupants and were eventually allowed inside. 6/2/09 RP 85. Massingale was inside the trailer. 6/2/09 RP 85-6. Holmes was able to match his shoes to one of the footprints he had been following. 6/2/09 RP 86. The time it took to locate Massingale from the time Holmes found the vehicle and started following the footprints was about an hour and ten to twenty minutes. 6/2/09 RP 99, 105.

Officer Heather Sorsdal of the Sedro Woolley Police Department was working that evening and responded to where the vehicle was located. 6/2/09 RP 108-10. Sorsdal and others officers followed the two sets of footprints. 6/2/09 RP 110-1. The footprints led to the residence on Wicker Road where they crossed the threshold. 6/2/09 RP 114-5. Once inside the trailer, Sorsdal was able to see that the shoes that bottom of the shoes Massingale was wearing matched one set of the footprints in the snow. 6/2/09 RP 116. Curtis Dupey was also arrested out of the trailer and the bottom of his shoes matched the other set of footprints that Sorsdal had been following. 6/2/09 RP 117-9.

Sergeant Dan McIlraith of the Sedro Woolley Police Department also responded to the location where Deputy Holmes found the stolen vehicle. 6/2/09 RP 133-4. When Sergeant McIlraith arrived he started to follow the footprints as well. 6/2/09 RP 135.

After contacting the residence on Laurel Drive, where the footprints first led, McIlraith returned to check the vehicle. 6/2/09 RP 136. McIlraith took a closer look at the footprints on return and found that there were two separate zig-zag patterns. 6/2/09 RP 137.

McIlraith searched the vehicle finding files and screwdrivers on the passenger floorboards. 6/2/09 RP 140. On the ignition, McIlraith saw various scrapes or marks that appeared as if it had been started with something other than a key. 6/2/09 RP 143. Those marks were consistent with his training and experience with stolen vehicles as marks that would be seen while starting the vehicle with something other than a key. 6/2/09 RP 143-4. McIlraith also found a white plastic bag with folded clothing inside the vehicle. 6/2/09 RP 144. In the bag was a pair of socks that matched the ones Massingale was wearing upon arrest. 6/2/09 RP 145.

Deputy Duhaime of the Skagit County Sheriff's Office also responded to the location where the vehicle was found. 6/2/09 RP 161-2. Duhaime observed two separate footprints leaving the stolen vehicle. 6/2/09 RP 163. Duhaime described the footprints leaving the driver's side as a flat skate-board-type shoe leaving the driver's side. 6/2/09 RP 163-4. The other shoeprint he observed, he described as more from a pointed tennis shoe with a clip in the heel.

6/2/09 RP 164. Using Exhibit 26, Duhaime described where he followed the footprints. 6/2/09 RP 164-5. The footprints showed the two people crossed fences, including an eight foot high fence with barbed wire the Duhaime did not cross. 6/2/09 RP 166. With assistance of other officers, the footprints were picked up on the other side of the fence. 6/2/09 RP 166-7. Duhaime followed the footprints to the trailer in Space 37 at Belling Court on Wicker Road. 6/2/09 RP 167.

Upon initial contact the homeowner told officers that there was no one in the house. 6/2/09 RP 168. Officers asked to check her house and said they would be getting a search warrant. 6/2/09 RP 171. She closed the door down to a crack and went to check. 6/2/09 RP 170-1. Duhaime heard the homeowner speaking along with two separate male voices, so Duhaime pushed the door open. 6/2/09 RP 170. Duhaime saw two men sitting on the couches who had not been there moments before. 6/2/09 RP 170. Joseph Massingale, the defendant, was one of the two men. 6/2/09 RP 171. The other man was Curtis Dupey. 6/2/09 RP 172. Duhaime testified that Dupey's shoes matched what he described as the pointed tennis type shoe with the clipped heel that came from the passenger side of the vehicle. 6/2/09 RP 172-3. Duhaime also testified that Massingale's

shoes were the flat skateboard-type shoes that he had seen leaving footprints from the driver's side. 6/2/09 RP 163-4, 173.

Massingale did not call any witnesses. 6/2/09 RP 176-7.

IV. ARGUMENT

1. There was sufficient evidence for the jury to find the defendant guilty of possession of stolen motor vehicle and use of motor vehicle theft tools.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. Hutton, 7 Wn. App. at 728, 502 P.2d 1037.

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. State v. Tockj, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001).

Massingale contests the sufficiency of the evidence for both possession of stolen motor vehicle and use of motor vehicle theft tools. However in evaluating the sufficiency of the evidence, Massingale draws negative inferences from the evidence contrary to the tests for sufficiency of the evidence. Drawing all reasonable inferences in favor of the jury's verdict, there was sufficient evidence of both charges.

- i. **Where the defendant drove off in a stolen vehicle when he saw an officer and fled the vehicle after abandoning it with motor vehicle theft tools inside, there was sufficient evidence for a rational trier of fact to find the defendant knowingly possessed a stolen motor vehicle.**

Possession of Stolen Motor Vehicle is codified in RCW 9A.56.068.

- (1) A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.
- (2) Possession of a stolen motor vehicle is a class B felony.

RCW 9A.56.068. "Stolen" means obtained by theft, robbery, or extortion. RCW 9A.56.010(14).

Possession may be actual or constructive. State v. Summers, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). "Actual possession" means that the goods were in the personal custody of the defendant; "constructive possession" means that the goods were not in actual, physical possession, but the defendant had dominion and control over them. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). "Dominion and control means that the object may be reduced to actual possession immediately." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). We examine the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found, to determine whether there is substantial evidence of dominion and control. State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009).

The jury was given the pattern instruction for possession of stolen motor vehicle.

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 17, 2008, the defendant knowingly received, retained, possessed, concealed or disposed of a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

(4) That any of these acts occurred in the State of Washington.

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

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

CP 78, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 77.21 (3d Ed).

The jury was given the pattern instruction for knowledge.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

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

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 73, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.02 (3d Ed)..

Although Massingale also argues against sufficiency of the evidence of possession, his primary argument was that there was

insufficient evidence to support knowledge the vehicle was stolen.

His actions on the night in question, support a contrary conclusion.

Bare possession of stolen property is insufficient to justify a conviction. See State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). "However, possession of recently stolen property in connection with other evidence tending to show guilt is sufficient." Couet, 71 Wn.2d at 775, 430 P.2d 974.

State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010).

Possession of recently stolen property coupled with evidence of flight, is sufficient to support a conviction for burglary.

While it is true, as Mr. Gonzales contends, mere possession of recently stolen property is insufficient evidence of burglary to make out a prima facie case, State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982), it will be sufficient if coupled with even slight collateral and corroborative evidence of guilt such as false or improbable explanations of possession, flight, or physical evidence of the defendant's presence at the scene of the burglary. State v. Q.D., 102 Wn. 2d 19, 28, 685 P.2d 557 (1984); State v. Mace, *supra*; State v. Portee, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946); State v. Rodriguez, 20 Wn. App. 876, 582 P.2d 904 (1978).

State v. Gonzales, 46 Wn. App. 388, 402-403, 731 P.2d 1101 (1986).

Similar evidence is sufficient to support a charge of possession of stolen property.

In the present case, the vehicle had been stolen ten days before Massingale was seen in the vehicle by the officer. 6/2/09 RP

29-30, 46. When the driver of the vehicle saw the officer at the gas station as he pulled in, the driver quickly accelerated out of the gas station and drove away. 6/2/09 RP 45-6. The officer believed the occupants changed their plans when they saw him. 6/2/09 RP 45-6. Massingale was identified as the driver based upon the footprints in the snow linking him to that side of the vehicle. 6/2/09 RP 163-4, 173. At about 2:00 a.m. on a snowy night, the vehicle was abandoned and based upon the footprints, the two occupants went on an extended hike including climbing over fences. 6/2/09 RP 166. In addition, there was damage to the passenger side door lock and ignition and tools that could be used to start the vehicle left in the vehicle. 6/2/09 RP 143. There was damage to the ignition consistent with the vehicle being started by something other than a key. 6/2/09 RP 143. There were also socks in a bag in the vehicle that matched those that Massingale wore. 6/2/09 RP 145.

This evidence in the vehicle as well as Massingale's actions in driving off when he saw the officer and abandoning and fleeing the vehicle were sufficient for a rational trier of fact to draw a reasonable inference that Massingale possessed the vehicle as the driver and knew the vehicle was stolen.

Massingale claims that the evidence in the present than in the case of State v. L.A., 82 Wn. App. 275, 918 P.2d 173 (1996)². In L.A., a fourteen-year-old was stopped driving a car taken without the owner's permission and that the car had a broken rear window. State v. L.A., 82 Wn. App. at 276. The court in L.A. noted that there was no damaged to the ignition. Id.

The State contends that the evidence in the present case was greater than in L.A. and also greater than in the case of State v. Womble, 93 Wn. App. 599, 969 P.2d 1097 (1999). In Womble, the defendant was a passenger in the vehicle and had given an improbable explanation about what he was doing in the vehicle and had fled from the vehicle when contacted by the owner. State v. Womble, 93 Wn. App. at 604. In Womble, there was no damaged ignition and no tools that could be used to enter or start the vehicle inside.

- ii. **Where there was damage to a door lock and ignition and tools inside the vehicle which were capable of damaging the vehicle and starting it, there was sufficient evidence to find the defendant guilty of possession of motor vehicle theft tools.**

² The State in L.A. conceded insufficiency of the evidence at the Court of Appeals. State v. L.A., 82 Wn. App. at 276.

Massingale also claims the files and the screwdrivers located in the vehicle were insufficient to support the conviction for possession of motor vehicle theft tools.

Any person who makes or mends, or causes to be made or mended, uses, or has in his or her possession any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools.

RCW 9A.56.063(1).

The jury was given instructions based upon the statute.

Motor vehicle theft tool includes, but is not limited to, the following: Slim jim, false master key, master purpose key, altered or shaved key, trial or jiggler key, slide hammer, lock puller, picklock, bit, nipper, any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft, or knowing that the same is intended to be so used. "False master" or "master key" is any key or other device made or altered to fit locks or ignitions of multiple vehicles, or vehicles other than that for which the key was originally manufactured.

"Altered or shaved key" is any key so altered, by cutting, filing, or other means, to fit multiple vehicles or vehicles other than the vehicles for which the key was originally manufactured.

"Trial keys" or "jiggler keys" are keys or sets designed or altered to manipulate a vehicle locking mechanism other than the lock for which the key was originally manufactured.

CP 80, RCW 9A.56.063. The elements instructions also mirrored the language of the statute.

To convict the defendant of the crime of making or having burglary tools, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 17, 2008, the defendant made, mended, or caused to be made or mended or possessed any motor vehicle theft tool that was adapted, designed, or commonly used for the commission of motor vehicle related theft;

(2) That the defendant's actions were under circumstances evincing an intent to use or employ, or allow the tools to be used or employed, or knowing that the tools were intended to be used or employed, in the commission of a motor vehicle theft ; and

(3) That this act occurred in the State of Washington.

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

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

CP 81. The instruction was framed using the pattern instruction for possession of burglary tools. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.11 (3d Ed).

The State contends that tools when located in a stolen vehicle with the ignition damaged and tampered with and with a passenger door lock which was broken when it was stolen is

sufficient to support a conviction for possession of motor vehicle theft tools.

This Court can draw from the similar charge of possession of burglary tools where case law shows that the inferences can support the conviction. State v. McIntosh, 42 Wn. App. 579, 584, 712 P.2d 323, *rev. denied*, 105 Wn.2d 1015 (1986) (probable cause existed to arrest for possession of burglary tools given late hour of detention, high incidence of area burglaries, lack of identification, suspicious explanation of previous whereabouts, dirty clothes, and carrying of knives); State v. West, 18 Wn. App. 686, 687-88, 571 P.2d 237 (1977), *rev. denied*, 90 Wn.2d 1001 (1978) (evidence defendant appeared to be prying open supermarket door with wrecking bar shortly after closing and attempted to flee from officer, sledge hammer, wrecking bar, and large iron chisel on ground next to door, near suitcase containing two chisels and saw, and indentation marks in door, sufficient to prove possession of burglary tools); State v. Walters, 56 Wn.2d 79, 83-84, 351 P.2d 147 (1960) (possession of several items including celluloid strips, which officer testified were commonly used by burglars to open type of doors found at apartment building that defendant had entered, as well as

false reason for being inside building, sufficient evidence to prove intent element of second degree burglary).

Here, Massingale was the driver of the recently stolen vehicle with a damaged ignition. 6/2/09 RP 29-30, 34, 46, 143. There was also damage to the passenger side door lock. 6/2/09 RP 34. There were files and screw drivers on the passenger side floorboard of the vehicle. 6/2/09 RP 140. The tools did not belong to the victim and therefore it is likely the person who stole the vehicle left them there. 6/2/09 RP 33-4. The ignition of the vehicle appeared to an officer who had training and experience regarding vehicle theft as if it had been started with something other than a key. 6/2/09 RP 143-4.

Given that the tools that did not belong to the victim were in the stolen vehicle and could have been used to commit motor vehicle theft, there was sufficient evidence to support the conviction.

2. The trial court did not err in denying the instructions proposed by the defense.

Massingale claims on appeal that the trial court abused its discretion in denying two instructions he proposed.

The instructions read:

Possession of recently stolen property alone is not sufficient to justify a conviction for the crime of possession of stolen property

CP 90.

A mere passenger in a vehicle cannot be presumed to be aware of the vehicle's legal condition.

CP 91.

The Court finds that this is not an appropriate instruction to give, and the basis for the request to give it is covered by the accomplice liability instruction, indicating that more than mere presence and knowledge is necessary. So the defense, one, can argue its theory of the case. That, two, the jury can understand what must be proven before they can find the defendant guilty.

6/2/09 RP 206.

The standard of review for jury instructions is whether the instructions are correct as a matter of law. State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). Jury instructions are constitutionally sufficient if the jury is instructed as to each element of the offense charged. State v. Pawling, 23 Wn. App. 226, 232, 597 P.2d 1367 (1979), *citing* State v. Emmanuel, 42 Wn. 2d 799, 259 P.2d 845 (1953).

State v. Edwards, 92 Wn. App. 156, 164, 961 P.2d 969 (1998).

Jury instructions as a whole must provide an accurate statement of the law and must allow each party to argue its theory of the case to the extent the evidence supports. State v. Benn, 120 Wn.2d at 654, 845 P.2d 289. Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary

mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

State v. Sublett, 156 Wn. App. 160, 183, 231 P.3d 231 (2010).

The State agrees that both statements are a correct statement of the law. They are appellate court explanations for application of principles of law which are the elements the State must prove. The proposed instructions are already part of the State's obligation to prove more than mere presence and possession. The State was required to prove knowledge of the stolen vehicle as well. CP 73, 78.

The first proposed instruction states read: "Possession of recently stolen property alone is not sufficient to justify a conviction for the crime of possession of stolen property." CP 90. In application, the elements instructions operates to tell the jury that they can only convict if they State proved knowledge the motor vehicle stolen.

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 17, 2008, the defendant knowingly received, retained, possessed, concealed or disposed of a stolen motor vehicle;

(2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

(4) That any of these acts occurred in the State of Washington.

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

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

CP 78, see also CP 73 (defining knowledge). Thus, the defense instruction is already part of the standard elements instructions. So, the jury is told what else they must find. Providing the defense instruction just states the same thing in an overly simplistic way.

Similarly as to the other defense proposed instructions the State's burden to prove knowledge in the instructions results in the jury being required to convict on evidence other than Massingale being a "mere passenger." CP 73, 78. Therefore, the instructions as given adequately permitted Massingale to argue his theory of the case.

The defense proposed instruction that a "mere passenger in a vehicle cannot be presumed to be aware of the vehicle's legal condition" assumes that Massingale or whomever the other person was had no other knowledge. The term "mere" places undue emphasis on one portion of the instruction. The elements instruction more appropriately defines the law.

Given that the State was required to meet its burden of proof and the instructions as given adequately provided the law, any error in denying defense instructions was also harmless.

A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case. State v. Jones, 95 Wn. 2d 616, 623, 628 P.2d 472 (1981).

The test for determining whether a constitutional error is harmless is whether it appears " 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " Neder v. U.S., 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (*quoting Chapman v. Cal.*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)); *see also State v. Easter*, 130 Wn. 2d 228, 242, 922 P.2d 1285 (1996) (court finds constitutional error harmless only if convinced beyond a reasonable doubt that any reasonable jury would reach the same result without the error).

State v. Buzzell, 148 Wn. App. 592, 601, 200 P.3d 287 (2009).

3. The prosecutor's closing argument did not result in prosecutorial misconduct³ or misconduct meriting reversal.

Courts of appeal review allegedly improper comments by a prosecutor in the context of the entire argument. State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009). Prosecutorial misconduct generally requires a new trial only when there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996).

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial, but not a trial free from error. State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009). To

³ The term prosecutorial misconduct is misleading. Misconduct should be reserved for intentional or at least reckless conduct.

"Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Courts in other jurisdictions have recently recognized the unfairness of labeling every mistake made by a prosecutor as "misconduct." See State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Maluia, 107 Haw. 20, 108 P.3d 974, 979-981 (2005); State v. Leutschaff, 759 N.W.2d 414, 418 (Minn. App. 2009), *rev. denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009). The more appropriate term would be prosecutorial error.

[T]he American Bar Association and NDAA urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant's rights are fully protected, to use the term "error" where it more accurately characterizes that conduct than the term "prosecutorial misconduct."

prevail on his claim of prosecutorial misconduct, the appellant bears the burden of proving, first, that the prosecutor's comments were improper and, second, that the comments were prejudicial. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); See State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's improper comments are prejudicial "only where there is a substantial likelihood the misconduct affected the jury's verdict." Id. (*quoting State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). A reviewing court does not assess "[t]he prejudicial effect of a prosecutor's improper comments ... by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Id. (*quoting Brown*, 132 Wn.2d at 561, 940 P.2d 546).

In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Fisher, 165 Wn.2d 727, 746-747, 202 P.3d 937 (2009)(*citing State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)).

National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010).

In determining whether a trial irregularity influenced the jury, a court may look at the seriousness of the irregularity, whether the statement in question was cumulative of other evidence properly admitted, and whether the irregularity could be cured by an instruction to disregard the remark. In re Det. of Smith, 130 Wn. App. 104, 113, 122 P.3d 736 (2005).

i. The prosecutor did not shift the burden of proof.

Massingale alleges that the prosecutor implying that he had burden to prove his innocence by noting that there was no evidence presented that the defendant had a key.

There State contends was no argument that the defendant had the burden to present any evidence only argument that a logical inference from the evidence was that the tools in the vehicle had been used to start it rather than they key that had been hidden in the vehicle.

In order to assert his claim, Massingale draws two separate portions of the State's closing argument thirty-seven pages apart into a single quote. When viewed in the context of the other argument, there was no suggestion by the prosecutor that Massingale had any burden to present evidence.

The first argument section reads in its entirety:

What's the purpose of having motor vehicle theft tools inside the vehicle on the floorboard of the passenger seat -- that you clearly need to use to operate the motor vehicle because you don't have a key to do so -- without knowing that the car was stolen? We know those tools were used because we know that there was damage to the lock and the ignition.

Now, you'll get a chance to look at some of these tools. I don't think you've seen these before, but these photographs will go back with you. They are things such as files, very thin, skinny files that you can easily insert. You can tell by the size and the way they're designed. You can insert these into a door or an ignition. There is another file and some screwdrivers on the floorboard. There is some other, kind of more pointer punch type mechanisms that can be inserted into those locations. These are easily accessible. They're right there on the floorboard of the vehicle in plain view for everybody to see and clearly used in order to operate this car.

You didn't hear any evidence that a key was located on anyone's person or as to how is it that they were operating this vehicle.

You know he at some point received it. Although, exactly when is not clear. We don't have to prove that he stole it but that he was in possession of it. He retained it. He using it, and he disposed of it. So any of those under prong one really fit with the facts of this case, as does two with the knowledge.

6/3/09 RP 223-4 (bold emphasis on portion complained of by Massingale).

But as far as the, who was the driver and who was the passenger -- so he's not the one in the vehicle, but if he is, he's the passenger and had no knowledge. Well, I submit to you based on all the evidence, he's the driver. But you know what, if he's

not, so what. That doesn't mean he's still not responsible for this particular crime, that he was not knowingly in possession of a stolen motor vehicle, even if he was the passenger in the vehicle.

And we know that because of, first of all, indicators, damage to the passenger side door. How did he gain access -- with damage to the passenger-side door, damage to the ignition. And they had to have used those tools on the floorboard of the vehicle. **There was no evidence that the key was missing or had been used from the vehicle, that spare key. There's been no evidence that the defendant's found that spare key and used it in the vehicle.** So what are they using as they drive down the street? They're using those tools.

6/3/09 RP 260-1 (bold emphasis on portion complained of by Massingale).

Read in context, the arguments by the prosecutor did not suggest that Massingale had a burden of presenting any evidence.

Massingale cites to two cases to support of his argument. The two cases are not comparable to the present case. In State v. Traweck, 43 Wn. App. 99, 715 P.2d 114 *rev. denied* 106 Wn.2d 1007 (1986), the prosecutor questioned why the defense did not bring in any other witnesses to explain the evidence. State v. Traweck, 43 Wn. App. at 106. In State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) *rev. denied*, 131 Wn.2d 1018 (1997), the prosecutor argued that since there was no evidence that the victim had

fabricated the allegation that the defendant must be convicted of rape. State v. Fleming, 83 Wn. App. at 214.

Neither of these cases is comparable to the present situation.

ii. **The prosecutor did not suggest that in order to acquit the defendant, the jury must find that the officers lied.**

Massingale contends that the prosecutor's rebuttal argument in which the prosecutor claimed that defense counsel had essentially had argued that the officers lied improperly required the jury to find the officers lied in order to find the defendant not guilty.

Since the prosecutor never argued that the jury had to find the officers lied in order to find the defendant not guilty, Massingale argues the suggestion that defense counsel made that the officers lied mischaracterized the defense closing to the extent that it "implied that the only way for the jury to acquit Massingale was to find the officers were lying." Appellant's Opening Brief at page 26.

Again viewed in context of the argument, that was not the implication by the prosecutor.

Well, I submit to you that none of the questions that counsels raised in her closing argument are of any significance or consequence to the outcome of this case based on the totality of the evidence before you. There simply red herrings designed to draw your attention away from what the evidence truly shows. I submit, again, as we talked about, a reasonable doubt

has to be reasonable. Were any of the questions she raised at all in this case reasonable? They were not.

For example, she says she doesn't want to disparage the officer's testimony in this case. She commends some of the things that he does, but questions everything that the do. **Essentially, what her closing argument did was tell you that every one of those officers got up here testified and lied. That when they testified that they, in fact, did see the tread in the snow. They lied. That when they said that when they were walking along and could contentiously see that tread in the snow, that they lied.** For what? What purpose does an officer have to get up here on the stand under oath and tell you that he or she saw something that they did not in fact see? Why? Why would they do that? For taking a motor vehicle case, for possession of a stolen motor vehicle? Seriously? It just doesn't make any sense.

There are in fact no inconsistencies or variations in this case. The fact that one officer claims there had been two to three inches of fresh snowfall but it wasn't snowing hard at that time -- well, what does that mean?

6/3/09 RP 256-7 (portion of argument complained of by Massingale in bold).

Massingale cites to cases where the prosecutor directly argued that in order to find the defendant not guilty, the jury had to find other witnesses had lied.

In State v. Barrow, 60 Wn. App. 869, 809 P.2d 209 (1991), the prosecutor argued that "in order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officer's testimony. You

have to believe the officers are lying.” State v. Barrow, 60 Wn. App. at 874-5. The Court of Appeals properly held this argument was error.

Other courts, moreover, consistently have found liar arguments similar to those at issue here to be improper. They reason that arguments about a defendant's opinion of the government's witnesses' credibility are irrelevant and interfere with the jury's duty to make credibility determinations. See, e.g., United States v. Richter, 826 F.2d 206, 208-09 (2d Cir.1987); United States v. Davis, 328 F.2d 864, 867 (2d Cir.1964); United States v. Hestie, 439 F.2d 131 (2d Cir.1971); People v. Ochoa, 86 A.D.2d 637, 446 N.Y.S.2d 339, 340 (1982). Based upon this authority and the related Washington cases of Green and Brown, we hold the arguments at issue here to be misconduct. It was a mischaracterization to say that the defendant was calling the officers liars. The officers simply could have been mistaken about the seller's identity. Furthermore, the jurors did not need to “completely disbelieve” the officers' testimony in order to acquit Barrow; all that they needed was to entertain a reasonable doubt that it was Barrow who made the sale to Officer O'Neal.

State v. Barrow, 60 Wn. App. at 875. Despite the erroneous argument and the fact that defense had objected, the court in Barrow did not reverse the conviction. Instead the court held that “given the arguments of both counsel, it does not appear to us that the prosecutor's improper argument would have the capacity to so inflame the jury that there is a substantial likelihood that the

defendant was denied a fair trial.” State v. Barrow, 60 Wn. App. at 879.

Massingale also cited to State v. Fleming. As mentioned previously Fleming, involved the prosecutor arguing that since there was no evidence the victim had fabricated the allegation that the defendant must be convicted of rape. State v. Fleming, 83 Wn. App. at 214. The particular argument reads:

[T]here is absolutely no evidence ... that [D.S.] has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.*

State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

Given the nature of the evidence in Fleming, the court did not find the error was harmless by a reasonable doubt.

In contrast to Barrow and Fleming, here there was no argument that in order to acquit the defendant, the jury must find that the officers had lied.

iii. The prosecutor's arguments regarding the vehicle prowling tools was properly based upon evidence in the record.

Massingale also argues that the prosecutor improperly argued facts which were not in evidence about the vehicle prowl tools located in the vehicle.

The State contends that the arguments by the prosecutor regarding the tools found in the vehicle are supported by the evidence that was admitted. The size and shape of the items that were admitted into evidence supports the argument of the prosecutor that the files and punch could be inserted into a lock or ignition. 6/2/09 RP 139-40. There was also damage to the passenger side door lock and ignition. 6/2/09 RP 34-5. The files and screwdrivers were inside the front of the vehicle. 6/2/09 RP 140. The tools did not belong to the victim and therefore it is likely the person who stole the vehicle left them there. 6/2/09 RP 33-4. The ignition of the vehicle appeared to an officer who had training and experience regarding vehicle theft as if it had been started with something other than a key. 6/2/09 RP 143-4.

The prosecutor's arguments based upon the size of the files and punch were supported by the evidence and the rational inferences from them.

Furthermore, the jury is instructed that the prosecutor's argument is not evidence and to "disregard any remark, statement or

argument that is unsupported by the evidence or the law in my instructions.” CP 67. The prosecutor’s arguments if inappropriate would have been disregarded by the jury.

iv. None of the prosecutor’s arguments were objected to or were so flagrant and ill-intentioned as to merit reversal.

Massingale did not object to any of what he claims on appeal are erroneous prosecution arguments.

To preserve a claim of prosecutorial misconduct, a defendant must timely object or move for a mistrial. See In re Det. of Law, 146 Wn. App. 28, 50-51, 204 P.3d 230 (2008); State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000); State v. Belgarde, 110 Wn.2d 504, 517-18, 755 P.2d 174 (1988). Either course allows the trial court to cure the error through a curative instruction. State v. Stamm, 16 Wn. App. 603, 614, 559 P.2d 1 (1976).

However, when the defendant has failed to either object to the impropriety at trial, request a curative instruction, or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Therefore, Massingale is entitled to relief only if the question was so flagrant and ill-intentioned that the only remedy is mistrial.

The State contends that arguments do not rise to that level.

4. The trial court did not abuse its discretion in denying a DOSA sentence.

Massingale contends that the trial court abused its discretion in denying a DOSA sentence.

A standard range sentence is generally not reviewable absent an abuse of discretion. State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). Judges are afforded “nearly unlimited discretion” in determining an appropriate sentence within the standard range. State v. Mail, 121 Wn.2d at 711. “[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length.” State v. Williams, 149 Wn.2d 146, 146-7, 65 P.3d 1214 (2003).

A court has broad discretion in deciding whether to impose a DOSA sentence. State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345, *rev. denied*, 132 Wn.2d 1007 (1997); State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). An abuse of discretion occurs when the court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Hays, 55 Wash.App. at 16.

In evaluating that claim, this Court should strongly consider that neither Massingale or his counsel initially requested a DOSA sentence at the initial sentencing hearing. 7/9/09 RP 95-104. The trial court on its own raised the possibility of a DOSA sentence and then continued the sentencing hearing for an assessment from the Department of Corrections. 7/9/09 RP 105-6.

After review of that assessment, the trial court chose not to impose a DOSA sentence. 8/13/09 RP 10.

Well, you've had treatment, Mr. Massingale, and you were successful in that treatment at least on the 30-day basis. I'm not a big fan of warehousing folks. You have a substantial criminal history, and both the presentence report writer and the state have very strong reasons for believing that you are not the kind of person we want to put in ADATSA⁴, and that you knew the consequences when you went out and once again chose to do a criminal activity. I would have hoped that there would have been a strong recommendation for ADATSA, and I am hopeful that you have turned the corner, and that you've decided that you've had enough of this life of crime and that you want to be part of your family's life.

8/13/09 RP 10.

On appeal, Massingale stated that the trial court "did not explicitly state that DOSA was denied because Massingale went to trial and planned to appeal." Appellant's Opening Brief at page 45.

But Massingale goes on to argue that the trial court improperly relied on the prosecutor and the Department of Corrections evaluator who expressed concerns about Massingale's motivation in obtaining treatment. Appellant's Opening Brief at page 45.

Massingale also claims that the department of corrections report was insufficient under RCW 9.94A.660(2). However, Massingale failed to note the error at the trial court and does not establish that this error resulted in a trial court abuse of discretion.

In considering the claim here, this Court should consider, State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005). In Grayson, the trial court categorically failed to meaningfully consider whether a DOSA sentencing alternative was appropriate because of the judge's concerns over funding for the program. The Supreme Court held that this categorical denial amounted to an abuse of discretion. State v. Grayson, 154 Wn.2d at 342. The Supreme Court ordered that the case be remanded the case to the trial court for a hearing on appropriateness of the DOSA sentence. State v. Grayson, 154 Wn.2d at 342.

⁴ The State believes these references in the record to ADATSA were actually meant by the trial court to be "a DOSA" and that the part-time court reporter who completed the transcript did not hear the trial court correctly.

In State v. Montgomery, 105 Wn. App. 442, 16 P.3d 1237 (2001), the Court of Appeals held that the trial court erred when it denied a DOSA sentence because the defendant took the case to trial. However, the Court of Appeals upheld the denial of the DOSA because the defendant was not statutorily eligible. State v. Montgomery, 105 Wn. App. at 445.

In contrast, here after trial the trial court on its own motion continued the case to give the defense time to gather evidence to support a DOSA and to get a presentence investigation report. Given the trial court's consideration given to the sentencing alternative, this Court cannot determine that there was an abuse of discretion.⁵

V. CONCLUSION

For the foregoing reasons, this Court must affirm Massingale's convictions and sentence.

⁵ While the court's rationale could have been more clearly expressed, it was not required to spell out a detailed justification for its determination. State v. Hays, 55 Wn. App. 13, 15, 776 P.2d 718 (1989). So long as the sentencing court's decision is not "manifestly unreasonable," it does not abuse its discretion. State v. McDougal, 120 Wn.2d 334, 354, 841 P.2d 1232 (1992).

DATED this 2nd day of August, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Vanessa M. Lee, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 2nd day of August, 2010.


KAREN R. WALLACE, DECLARANT