

NO. 65456-0-1

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

STATE OF WASHINGTON

Respondent

v.

JASON KILLINGSWORTH,

Appellant

2011 MAR 30 AM 10:03

APPELLANT'S BRIEF

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the evidence sufficient to find the defendant guilty of first degree trafficking in stolen property beyond a reasonable doubt?

2. Did the trial court fail to properly instruct the jury on every element of the offense?

3. Has the defendant waived any argument that the prosecutor committed misconduct in closing argument when he did not object to the arguments he now claims were improper, and if they were improper any prejudicial effect could have been neutralized by a curative instruction?

4. Did the prosecutor's closing argument permissibly draw reasonable inferences from the evidence regarding the defendant's knowledge that the property he pawned was stolen?

II. STATEMENT OF THE CASE

Trista Lemmons lived with her husband and brother, Stephen Hendrickson, in Stanwood in July 2009. Ms. Lemmons owned a 2004 black Volkswagon Jetta that she parked in front of their home. Her husband owned a truck that was also parked in front of their home. The couple kept a key to the Jetta in the center console of the truck, hidden under a book of CDs. On July 12 just

before midnight Ms. Lemmon's neighbor, Michael Hayslip saw Ms. Lemmons' Jetta parked in front of her home. By 5:30 a.m. the next morning the Jetta was gone. 1 RP 14-15, 57, 59-60, 81.

Mr. Hendrickson made a habit of checking the house before going to bed. While performing that task about 10:00 p.m. on July 12 Mr. Hendrickson noticed that the dome light was on in the truck in front of their home. Nearby he saw two people under a street lamp. Mr. Hendrickson alerted his sister and brother in law and then went down to investigate. By the time he got downstairs he saw the two people running off in different directions. Ms. Lemmons, her husband, and Mr. Hendrickson looked in the truck but did not see anything missing. They did not look under the book of CDs. Mr. Lemmons then locked up the truck and they retired for the night. 1 RP 59-60, 81-82.

Then next morning about 5:30 a.m. Ms. Lemmons went out to go to work when she discovered that her car was missing from their home. She alerted her husband and brother, and then called the police. They checked the center console of the truck and found the key to the Jetta had been stolen. While they were waiting for the police to arrive they noticed the Jetta sitting in a field down the street from their home. They checked out the car and found that it

has been severely damaged. The front end, passenger side, and the lights were smashed. Grass was imbedded in parts of the car. One of the tires was flat. Ms. Lemmons' insurance company totaled the car. In addition to the damage, Ms. Lemmons discovered that her iPod and Tom Tom GPS system that had been in her car had been stolen. 1 RP 45, 60-63, 83-84.

Mr. Hendrickson found a plastic Haggen grocery bag containing a can of beer in front of the Jetta. While they were cleaning out the car in preparation for towing they found a balled up receipt from Haggen's in the passenger side door pocket. Ms. Lemmons gave the receipt to Deputy Eakens. The receipt was for a can of Steel High Gravity beer and a package of cigarettes purchased at the Haggen store at 12:38 a.m. on July 13, 2009. Information on the receipt led investigators to Catherine Bowen. Ms. Bowen was a friend of John and Kim Killingsworth, and had rented an apartment from them located in the downstairs portion of their home. Ms. Bowen identified the defendant, Jason Killingsworth, as Mr. and Mrs. Killingsworth's son 1 RP 9-11, 27-28, 63-66, 85-86, 99-100 Ex. 2.

Mr. Hendrickson asked Mr. Clyde Ellis, the manager of Haggen's, to review the store surveillance video to see if he could

find the transaction associated with the receipt found in Ms. Lemmons' car. The surveillance video showed a man coming into the store, going to the beer department, coming back with a can of beer, going through the check-out stand and then going to guest services to pick up a pack of cigarettes between 12:33 a.m. and 12:39 a.m. Detective Bayler obtained some still photos from the video tape and showed them to Ms. Bowen. Ms. Bowen identified the man in the video as Jason Killingsworth. 1 RP 20-26, 87, 101.

Detective Bayler then ran the defendant's name through a pawn database known as Leads Online. That database contains information from pawn shops in the county that record detailed information from all pawns that are transacted on a daily basis. The detective learned from that database that the defendant had pawned an iPod and a GPS unit at a pawn shop. The record contained serial numbers for each of those items. The detective then obtained the serial numbers of the stolen iPod from Ms. Lemmons. Ms. Lemmons also provided specific information that was in her stolen GPS unit. That serial numbers matched the serial numbers of the iPod from the pawn record. Ms. Lemmons was able to identify the pawned iPod and GPS unit from the serial numbers and the contents of those two devices. Ms. Lemmons had not

given the defendant or anyone else permission to take her car, her iPod or her GPS. 1 RP 60, 67-73, 101-104.

Susan Thompson, an employee of the pawn shop where Ms. Lemmons' iPod and GPS had been pawned, identified the defendant as the person who pawned those two items, both in court and in a photo line-up. A pawn slip filled out at the time the defendant pawned the iPod and GPS included identifying information for those two items as well as the defendant's signature attesting that the items pawned were not stolen. The paperwork showed the defendant pawned the items on July 13, 2009 at about 1:30 p.m. 2 RP 104-111, 129-133, Ex. 15, 16¹.

The defendant was charged with Theft of a Motor Vehicle (count I), Trafficking in Stolen Property First Degree (count II), and Taking a Motor Vehicle Without Owner's Permission Second Degree. (count III). 1 CP 70-71. The jury acquitted the defendant on count I and hung on count III. The jury found the defendant guilty of Trafficking in Stolen Property First Degree. 1 CP 17, 21.

¹ Copies of those exhibits are attached to this brief

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO FIND THE DEFENDANT GUILTY OF TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE.

To convict the defendant of Trafficking in Stolen Property First Degree the jury must find the defendant knowingly trafficked in stolen property. RCW 9A.82.050. "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person. RCW 9A.82.010(19). The defendant argues the evidence was insufficient to find him guilty of Trafficking Stolen Property First Degree. Specifically he argues the evidence did not establish that he knew the iPod and GPS were stolen when he pawned them.

Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027, 230 P.3d 1060 (2010). When evaluating the sufficiency of the evidence a

reviewing court will treat circumstantial evidence as probative as direct evidence. Id. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008, 928 P.2d 413 (1996).

Under these principles there was sufficient evidence from which a rational trier of fact could have concluded that the defendant knew he was selling stolen property when he pawned the iPod and GPS unit. The jury could reasonably conclude that the defendant had been in Ms. Lemmons' vehicle some time after 12:40 a.m. on July 13 because the video surveillance tied the defendant to the receipt found in her car and the Haggens' bag and beer can found just outside her car. Ms. Bowen's rewards card was used to get a .30 cent discount on the beer. Ms. Bowen did not say she bought beer at that time of the morning. She had known the defendant for a long time, and identified him as the man

in the picture taken at the time of the beer sale going to and from the beer case. 1 RP 101. It was not necessary to use Ms. Bowen's card to get the discount; using the phone number associated with her account was sufficient. 1 RP 12. Since Ms. Bowen had used the defendant's parent's phone number for her account, her account number would show up on the receipt if the defendant had used his parent's number during the beer transaction.

From the evidence that the defendant had been in Ms. Lemmons' car sometime after 12:40 a.m. and evidence that Ms. Lemons iPod and GPS were in the car at the time it had been stolen, a jury could reasonably infer that those things had been in the car at the time the defendant was there. From that a jury could conclude that either the defendant or a companion had taken those things while in the car. The jury could reasonably conclude that the defendant would therefore know that once he had taken possession of them that they were stolen items.

The evidence showed the car was stolen sometime after midnight on July 12 and the defendant pawned the items around 1:30 p.m. on July 13. From this quick turnaround the jury could conclude that the defendant was getting rid of those items because

he knew that they were stolen and did not want them in his possession.

Although there was no evidence that the defendant purchased the items from some other person, even if the jury considered that possibility rational inferences from the evidence show the defendant knew the property was stolen. As the prosecutor suggested in closing argument, if the defendant had purchased the items from someone else he would not have paid more than the \$50 he got for pawning the items. Paying that much less than what one would commonly understand the fair market value for those items to be would cause someone to know that they were likely stolen.

The defendant's arguments challenging the sufficiency of the evidence do not consider the evidence in the light most favorable to the State, and any inferences that can be drawn therefrom. He first points to the jury's decisions on the other two counts. Those decisions have no relevance to the sufficiency of the evidence for count II because the elements of those crimes were completely different. It is possible that the defendant did not personally steal the car. The jury was not instructed on accomplice liability, so it did not have the opportunity to consider whether the defendant was

guilty as an accomplice. In addition the jury was instructed to treat each count separately. 1 CP 42.

The defendant points to the evidence that the steering column was not damaged, but completely ignores the evidence that the rest of the car was severely damaged and left abandoned in a field with the defendant's beer can on the ground a few feet away. That evidence suggests that the person who was in possession of the vehicle had no ownership interest in it. A person with no right to possess the vehicle would not have the same interest in the car or the condition it was left as someone who owned the car. One would reasonably expect a person who had a right to possess it would not have abandoned it in a field without contacting the owner to take care of it. That evidence combined with evidence of the receipt left in the car shows the defendant was in the car at the time that it was damaged and abandoned. A juror could reasonably conclude that the defendant knew the car and its contents, including the iPod and GPS, were stolen.

Finally the defendant points to the measures taken by the pawn shop to ensure that pawned items were not stolen. He fails to acknowledge the evidence that those procedures are not failsafe, and that the pawn shop had taken items later found to be stolen

despite those precautions. 2 RP 128-129. The defendant's pawn history with the shop, when taken in a light most favorable to the State, shows the defendant was comfortable using the shop to fence his stolen goods. There was no evidence the defendant knew what the pawn shop did with the information it collected from him when pawning items. Even if he did know the police had access to that information all that would establish is that he was not careful in covering his tracks; it did not show that thought that he had a right to pawn Ms. Lemmons' property when considered in light of all the other evidence produced.

B. THE JURY INSTRUCTIONS REQUIRED THE STATE TO PROVE EVERY ELEMENT OF THE CRIME OF TRAFFICKING STOLEN PROPERTY FIRST DEGREE.

The defendant argues the "to convict" instruction relieved the State of its burden to prove all of the elements of trafficking in stolen property in the first degree because it did not require the jury to find the defendant knew the property he trafficked was stolen. Because the only rational reading of the "to convict" instruction did inform the jury of all of the essential elements of the crime this argument should be rejected.

A "to convict" instruction must contain all of the elements of the crime. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000

(2003). A reviewing court does not rely on other instructions to supply an element missing from that instruction. Id. Not every omission of information from a “to convict” instruction relieves the State of its burden of proof; only the total omission of essential elements can do so. State v. Sibert, 168 Wn.2d 306, 312, 230 P.3d 142 (2010). The reviewing Court assumes that the jury read the instructions in a normal, common sense manner. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, review denied, 164 Wn.2d 1034, 197 P.3d 1185 (2008).

A person who knowingly traffics in stolen property is guilty of trafficking in stolen property in the first degree. RCW 9A.82.050. The elements of trafficking in stolen property are (1) that the defendant trafficked in stolen property (2) that he acted knowingly, and (3) that the acts occurred in Washington. State v. Walker, 143 Wn. App. 880, 181 P.3d 31 (2008).

The defendant does not deny that the mens rea element of knowledge is present in the “to convict” instruction. His argument is that a jury would not understand the knowledge element relates to the property as well as the act of trafficking. A common sense reading of the instruction by an ordinary person results in reading

the word “knowingly” as modifying the entire phrase “trafficked in stolen property.”

Jury instructions are considered as a whole. State v. Eaker, 113 Wn. App. 111, 117, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003, 67 P.3d 1096 (2003). Traffic was defined as “to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person.” 1 CP 52. The jury was also instructed that “[a] person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.” 1 CP 55. (emphasis added). When considered together one could not knowingly traffic stolen property without knowing the property trafficked was stolen. The phrase traffic stolen property is made up of an act, trafficking, and a fact, that is that the property in question was stolen. Any act which is done in relation to a fact necessarily requires the mental state associated with that act to apply equally to the fact. As an example, if the crime were to knowingly run a red light, the defendant could not have run the light knowing he was doing so without also knowing the light was red.

The defendant cites no relevant case authority that a jury instruction written in the language used by the statute is constitutionally insufficient to inform the jury of the elements of the

crime. Rather he relies on cases discussing the adequacy of self defense instructions. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009) ("Jury instructions must more than adequately convey the law of self defense."), State v. Harris, 122 Wn. App. 547, 554, 90 P.3d 1133 (2004)(recognizing that the standard for self defense instructions is that it must make the law of self defense "manifestly clear."), State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)(same). These cases are not helpful in assessing the adequacy of the "to convict" instruction in this case because they address a completely different issue.

The defendant argues the second sentence in instruction 18 creates the impression that the defendant need not know the property was stolen in order to be guilty of trafficking in stolen property. That instruction stated in part "It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime." 1 CP 55. This argument should be rejected because it assumes the ordinary juror would read the words "stolen" and "property" in isolation rather than as the phrase that those two words make up to constitute the "fact" at issue. That portion of the instruction simply instructs jurors that it is not

necessary that the defendant know that trafficking “stolen property” is unlawful, or that it is an element of a crime.

Even if it was error to not set out the knowledge requirement separately for both trafficking and stolen property, the error was harmless. Error in instructing the jury is harmless if the error does not relieve the State of its burden of proof. State v. Reed, 150 Wn. App. 761, 770, 208 P.3d 1274, review denied, 167 Wn.2d 1006, 220 P.3d 210 (2009). Only a strained reading of the instruction results in the conclusion that the jury could find the defendant knowingly disposed of stolen property to another person without also finding the defendant knew the property was stolen. Because the Court does not consider the adequacy of an instruction in that light, but rather in the manner in which an ordinary juror would ordinarily read it any error was harmless. No ordinary juror would read the “to convict” instruction in the way the defendant urges the Court to do so.

Finally the defendant claims the instruction was not harmless because the evidence he knew the property was stolen was conflicting and not overwhelming. BOA at 16. It was uncontroverted that the defendant did not have permission to have Ms. Lemmons’ property in his possession. The property was stolen

in the middle of the night, and pawned less than one day later for a smaller sum of money than one would reasonably expect to pay for even a used iPod and GPS unit. There was no evidence the defendant purchased the property from someone. There was evidence the defendant was in the same car with that property at some point between midnight and 5:30 a.m. on July 13. Contrary to the defendant's assertion the evidence was not conflicting or weak; it presented a compelling circumstantial case that the defendant knew he was pawning stolen property. Thus even if the instruction should have set out the knowing mens rea separately to modify both trafficking and "stolen property" any error was harmless.

C. THE DEFENDANT FAILED TO PRESERVE THE ISSUE OF PROSECUTOR MISCONDUCT IN CLOSING ARGUMENTS. THE PROSECUTOR'S CLOSING ARGUMENTS WERE PERMISSIBLE.

A defendant who argues that a prosecutor committed misconduct bears the burden to prove the conduct was both improper and that he was prejudiced. State v. Babiker, 126 Wn. App. 664, 668, 110 P.3d 770 (2005), review denied, 161 Wn.2d 1015, 171 P.3d 1057 (2007). Any allegedly improper comment in closing argument must be viewed in the context of the issues in the

case, the evidence, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Prejudice resulting from a prosecutor's closing remarks is established only when "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

If the defendant did not object to allegedly improper comments at trial the error is waived unless the comments are so flagrant and ill intentioned that the resulting prejudice cannot be cured by an instruction. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 108, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998), State v. Klok, 99 Wn. App. 81, 992 P.2d 1039, review denied, 141 Wn.2d 1005, 10 P.3d 404 (2000). Failure to object and request a mistrial or curative instruction strongly suggests to a court that the argument in question did not appear critically prejudicial to an appellant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." State v. Russell,

125 Wn.2d 25, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

The defendant argues the prosecutor committed misconduct in closing argument by suggesting that the defendant failed to produce evidence which provided a reasonable explanation for why he had Ms. Lemmons' property in his possession when he pawned it. The defendant claims the remarks were an improper comment on the defendant's decision not to testify at trial and shifted the burden of proof to the defendant to prove his innocence. Although he argues the alleged misconduct occurred multiple times, he points to only two portions of the record. In neither case did the prosecutor argue the defendant was guilty because he failed to produce evidence or provide a reasonable explanation for pawning the stolen items.

The defendant first points to the prosecutor's argument concerning how the defendant could have come by the items of property. The prosecutor argued:

Now, if it wasn't Jason Killingsworth taking it (the car) back, and it was another thief, why would they go back to within half a block of the victim's house? They might get caught. The victim would see the car. The only reasonable explanation for the car being found there is that this guy took it. And you don't have to be smart to commit a crime. He was trying to

make it home, didn't make it, left the car there. No one else who was in that car would come back to the location of the scene of the theft. Remember, that the crash was some distance away, in this field where they picked up all the mud and that. So somebody took this wrecked car, and instead of fleeing, immediately drove it back to that location. This guy. There's no other reasonable explanation.

2 RP 171.

A prosecutor has wide latitude to draw reasonable inferences from the evidence and express those inferences in closing argument. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). The prosecutor's argument at this point in the transcript did just that. Contrary to the defendant's argument the prosecutor neither "mocked" the idea that the defendant obtained the stolen items innocently or faulted him for not providing a reasonable explanation. The prosecutor did not directly or indirectly even mention the defendant's case. Rather the prosecutor was suggesting alternative explanations for Ms. Lemmons' car ending up damaged and down the street from her home, and explaining why they were not reasonable under the facts of the case. This was a permissible argument.

In any event this portion of the argument related to the theft of the car, or possibly the taking motor vehicle without owner's

permission charges. The defendant was acquitted of one charge, and the jury hung on the other. The defendant was not prejudiced by this argument.

The next portion of the prosecutor's closing argument that the defendant states constituted misconduct occurred directly after the first alleged error. 2 RP 171-173. This argument related to the trafficking stolen property charge. The prosecutor first pointed to the short time frame between the theft and the pawn. He then answered a question raised by the defense in opening statement regarding the defendant using his own name to pawn the items.

Of course he did. Otherwise you can't pawn it. It's the only way you can pawn it. Once again you don't have to be smart. If nobody's looking for the stolen car, nobody's going to be looking for the pawn. That's the chance you take when you steal and pawn when you traffic.

2 RP 172.

The prosecutor then argued that given the timing of the theft and the pawn the defendant must have obtained the property sometime in the middle of the night. He argued that if the defendant got the property from someone else he would have paid less than \$50 for it, because it would make no sense to pay more than that, and then take a loss a short time later at the pawn shop.

From that deduction the prosecutor argued the reasonable inference was that the defendant would have known that the items were stolen when he pawned them because the price was too little to be fair market value for those items. 2 RP 172-173.

A prosecutor may commit misconduct in closing argument by stating the defense did not present witnesses or urge the jury to find the defendant guilty because he did not present evidence to support his theory of the case. State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010). In contrast it is not misconduct for a prosecutor to argue that the evidence does not support the defense theory of the case. Russell, 125 Wn.2d at 87. Here the prosecutor did no more than argue that evidence, and reasonable inferences from that evidence, did not support the conclusion that the defendant innocently pawned Ms. Lemmons' property. Similar to the argument about the stolen vehicle, raising possible innocent explanations for the defendant's conduct, and then explaining why they were not reasons to doubt his guilt, does not suggest the defendant is guilty because he failed to produce evidence which proved him guilty. The prosecutor's argument was no more than an argument that the only rational conclusion to be drawn from the

circumstances was that the defendant knew the property was stolen when he pawned it.

The defendant relies on several cases to illustrate when a prosecutor's closing argument constitute misconduct for the reasons he argues the prosecutor in his case committed misconduct. Those cases do not support the defendant's position here because the facts and arguments made in there are far different from those at issue in his case.

In Fiallo-Lopez the prosecutor argued there was no evidence to explain why the defendant was present at the location of two drug deals, or why he had contacted one of the participants at each location. The prosecutor also argued the defendant did not try to rebut the State's evidence regarding his involvement in the drug deal. State v. Fiallo-Lopez, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995). This Court found the argument was improper because no one other than the defendant could have supplied the answers to the prosecutor's arguments, thus improperly commenting on the defendant's right to remain silent and shifting the burden of proof. Id. at 729.

In Charlton, defense counsel argued that the State had not met its burden of proof because it did not call an informant that

could have rebutted his unwitting possession of controlled substances defense. State v. Charlton, 90 Wn.2d 657, 660, 585 P.2d 142 (1978). The prosecutor responded by pointing out the defendant did not call his wife to corroborate his story, when his wife had been present at the time of the transaction. Id. The Court found that this comment on the defendant's exercise of his marital privilege was similar to a comment on the exercise of his right to remain silent, and was therefore improper. Id. at 663-664.

In Reed the defendant was charged with murder and robbery for killing his employer and stealing his car. State v. Reed, 25 Wn. App. 46, 604 P.2d 1330 (1979). The defendant had been hired to work on the victim's farm. The victim was found dead, and his car and the defendant were missing. The car turned up abandoned some distance away. The defendant had apparently left without being paid. With respect to that latter fact the prosecutor argued "Nobody has said, 'Yes, I was paid.' No one has said that. But the evidence in this case has to be that he was not paid, because there is nothing to rebut that." Id. at 49. The Court held this comment was improper because it was a direct comment on the defendant's failure to testify. Id.

Here the prosecutor did not directly or indirectly suggest that the defendant failed to produce evidence which he could have or should have produced which would rebut the State's evidence circumstantially proving he was guilty. Nor did the prosecutor comment on the defendant's failure to testify. Rather the prosecutor drew permissible inference from the evidence which circumstantially proved the defendant knew that the GPS and iPod had been stolen at the time that he pawned them.

Finally, even if the Court were to find these comments were somehow improper, the defendant has failed to show that any prejudice could not have been neutralized by a curative instruction. The defendant does not address this point except to state that the alleged misconduct caused "enduring and resulting prejudice" to him. BOA at 25. But, if the prosecutor's arguments were erroneous an instruction could have cured any prejudice to the defendant. He has waived the claim that the prosecutor committed misconduct.

The Court found the prosecutor committed error in arguing that in order to find the defendant not guilty the jury needed to be able to say "I don't believe the defendant is guilty because" and then fill in a reason the jury found him not guilty in Anderson, 153

Wn. App. at 431. The comment was improper in part because it implied the defendant was responsible for supplying the jury a reason to acquit him. Id. Nonetheless the Court held the claim of misconduct was waived because the defendant did not object to the argument and he failed to demonstrate to the Court that the comments were so flagrant and ill-intentioned that an instruction could not have cured the prejudice. Id. at 432.

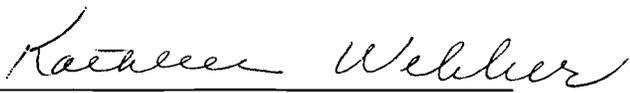
If the prosecutor's arguments in this case could at all be construed as an argument that the defendant had some burden to prove his innocence, or that he should be found guilty because he did not testify, the arguments were far more subtle than those made in Anderson. If the prejudice from the arguments in Anderson could have been cured with an instruction, then surely the same is true of the arguments made here. Because the defendant has failed in his burden of proof the Court should reject his argument that he is entitled to a new trial for prosecutorial misconduct in closing arguments.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on March 29, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent



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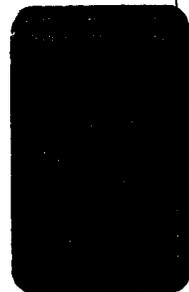
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PLEDGOOR'S NAME (Last Name First) KILLINGSWORTH, JASON	ORIGINAL PAPER NO.	LOAN NUMBER 144959
PLEDGOOR'S ADDRESS (Residence) 8118 317TH ST, MARYSVILLE, WA 00000-0000	DATE and TIME MADE 7/13/2009 12:00:00 AM	MATURITY DATE 10/11/09
<p align="center">Jerry's American Loan, Inc.</p> <p align="center">1207a Second Street - Marysville, WA 98270 (360) 653-8484</p>	AMOUNT FINANCED: The amount of cash given directly to you.	\$50.00
	FINANCE CHARGE: The dollar amount the credit will cost you	\$13.50
If (s) Item(s): Electronic, MP3 Player: APPLE 8GB Serial: 7N803Y8U13F, NAVMAN GPS/BBT84M46483	TOTAL OF PAYMENTS: Amount required to redeem loan on the Maturity Date.	\$83.50
	ANNUAL PERCENTAGE RATE: The cost of your credit as a yearly rate.	148.00%
	PAYMENT SCHEDULE: Total of payments is due on the Maturity Date shown above.	
	PREPAYMENT: If you pay off early, you may be entitled to a refund of part of the finance charge.	
	90 day interest charge:	\$7.50
	Document Prep Fee:	\$8.00
	Storage Fee:	\$3.00
	Firearm Fee:	
	Total Finance Charge:	\$18.50

See your contract document for any additional information concerning non-payment, default, and prepayment refunds or penalties.

Total amount due on or after: 07/13/09 and on or before 08/12/09 is \$83.50
 Total amount due after: 08/12/09 and on or before 09/11/09 is \$86.00
 Total amount due after: 09/11/09 and on or before 10/11/09 is \$88.50
 An interest charge of \$2.50 is earned every 30 days

This is a 90 day loan. There is no Grace Period.
 By signing, I agree to all terms and conditions on the front and back and acknowledge, receipt of a copy of this ticket.

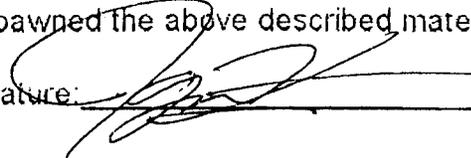
CITY OF MARYSVILLE PAWN SHOP AND SECONDHAND DEALERS REPORTING FORM

Business Name Larry's American Loan, Inc.		Employee SEM		Date 7/13/2009 1:33:46 PM	
Name KILLINGSWORTH, JASON		Birthdate 05/19/80		Driver's License ID # KILLINJN201KR WSDL	
Address 3116 317TH ST		City MARYSVILLE		State WA	
Phone		Zip 99000-0000		Phone	
Sex M	Race C	Height 5 11	Weight 147	Eye Color [REDACTED]	Social Security Number [REDACTED]

Property: Electronic/iMP3 Player: APPLE 8GB Serial:7N803Y8U13F, NAVMAN GPS/BBT84M46483

Pawn Number	Total Amount	Barrel Length	Caliber	Action
144959	\$50.00			

This Certifies that I, the undersigned, today sold/pawned the above described material, and I further certify that the material that I sold/pawned is not stolen.

Signature:  Date: 7.13.09