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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion to dismiss counts II, III and IV.
2. There was not sufficient evidence in Count I of Theft in the First Degree in violation of the Fourteenth Amendment.
3. There was not sufficient evidence in Count II of Possession of Stolen Property in the First Degree in violation of the Fourteenth Amendment.
4. There was not sufficient evidence in Count III of Possession of Stolen Property in the second Degree in violation of the Fourteenth Amendment.
5. There was not sufficient evidence in Count IV of Possession of Stolen Property in the Second Degree in violation of the Fourteenth Amendment.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it denied the defendant's motion to dismiss counts II, III and IV after the state concluded its case in chief? (Assignment of Error No. 1).
2. Whether there was sufficient evidence of the crimes of:
 1. Theft in the Second Degree: Toys R US
 2. Possession of Stolen Property in the First Degree: Big 5 Sporting
 3. Possession of Stolen Property in the Second Degree: JC Penney
 4. Possession of Stolen Property in the Second Degree: Hallmarkto allow the jury to convict the defendant? (Assignments of Error 2-5).

B. Statement of the Case

Statement of Procedure

The defendant was charged by amended information with four counts of theft and possession of stolen property all alleged to have occurred on December 18, 2004 in Kitsap County, Washington. CP 11. Count I alleged Theft in the Second Degree contrary to RCW 9A.56.020(1)(a) and RCW 9A.56.040(1)(a). CP 11. Count II alleged Possession of Stolen Property in the First Degree contrary to RCW 9A.56.140(1) and RCW 9A.56.150(1). CP 12. Count III alleged Possession of Stolen Property in the Second Degree contrary to RCW 9A.56.140(1) and RCW 9A.56.160(1)(a). CP 12-13. Count IV alleged another count of Possession of Stolen Property in the Second Degree. CP 13; I RP 3. Each count alleged that the defendant acted “as a principal and/or as an accomplice of another person contrary to RCW 9A.08.020(2)(c). CP 11-13.

The defendant was found guilty of all four counts. CP 90. She was sentenced to concurrent standard range sentences of 18 months on Counts I, III and IV and to 24 months on Count II. CP 94. On February 14, 2006 the defendant appealed the judgment and sentence. CP 101.

Statement of Testimony

The alleged incident occurred at the Kitsap Mall in Silverdale,

Washington on December 18, 2004 involving four stores: Toys R US, Big 5 Sporting Goods, J.C. Penney and Hallmark Stores. CP 11-13.

Troy Graunke testified that he was a Kitsap County Deputy Sheriff for four years working as a patrol deputy on December 18, 2004 . I RP 29. He was contacted by CenCom that there was a theft in progress at Toys R Us. I RP 31. He testified that as he approached: "I saw a white Chevy Tahoe pull out. And the right rear passenger door was open, and it appeared somebody's legs were hanging out of the vehicle, and the vehicle's lights were off, and it was leaving at a high rate of speed." I RP 31-2.

The officer eventually conducted a felony stop at the Kitsap Mall. I RP 34. At least three or four other deputies arrived. Five suspects were told to emerge from the vehicle one at a time. I RP 35; exs.1-5. The deputy identified the defendant and testified that on the date of the incident her hair was in corn rows or braids at the time of her arrest. I RP 37.

When the people emerged from the vehicle the deputy could not remember where the defendant was seated in the vehicle or from which side of the vehicle she emerged. I RP 38. The interior of the vehicle was filled with merchandise in shopping bags or loose. The deputy testified "...It appeared to me pretty much it was filled from the very back compartment all the way up, front seats, almost to the height of the cab, for

the most part, front to back, side to side.” I RP 39.

The merchandise was removed from the vehicle and separated into piles according to each retailer. I RP 40. The merchandise was itemized and returned to the respective store and a receipt obtained from the store. I RP 41-3.

On cross-examination the deputy admitted that he did not know or record where each person was located inside the vehicle before they emerged. I RP 46. Also, it was not recorded by the deputies involved in inventorying the Chevy Tahoe where each item was located inside the vehicle i.e., what was on top and what was on the bottom of the stacks. I RP 50, 55.

Stephen Byron testified that he was employed at Toys R Us as a floor manager during December 2004. II RP 74. His attention was directed to the kitchen aisle. There he observed: “There were four ladies there. A couple of them were keeling down, and one had a cart. And they were stuffing toys into bags, like giant gift bags, garbage bags, that kind of stuff.” II RP 76. One of the bags was a Toys R Us bag and the rest were “big, plastic bags.” *id.*

Each of the women he observed were taking toys and putting them into bags that were in the cart. *id.* Also, they were stuffing toys into large bags that were not in the cart. II RP 77. The Toys R Us store manager

grabbed two of the bags and in the company of one of the women headed to the service desk to check out the items. Meanwhile, Mr. Byron held onto the cart as it was being pushed out of the store by one of the other ladies, who was identified in court as Sheron Noble. II RP 83; exhibit 2.

Byron testified that as they entered the parking lot, "...the littler gal was kind of looking, running back and forth, kind of looking for their car....and she says, ..I'm going to go bet my Glock.." II RP 79-80. Byron identified this person as the defendant. II RP 83; ex. 5. Then Byron let go of the cart.

He saw a white SUV Bronco driving between him and the other women who had taken off running. II RP 80. Byron attempted to get the license plate number as the women piled into the vehicle. He observed a sheriff's vehicle parked nearby. He testified: "...I'm waving frantically at him and pointing at them." II RP 81.

Actually, Byron was on his cell phone to a fellow employee who was on her cell phone to 911 who was in contact with the police vehicle. Byron confirmed that the suspect vehicle was "a white car,." *id.* At that point the police vehicle "turned on his lights." *id.*

Byron returned to his store. Later, he was dispatched to the Kitsap Mall to identify his product. *id.* At that time he recognized the women who had been in his store. II RP 82-4. Later, the product was taken back

to his store where they “...ring up an actual receipt without it reflecting in the daily sales, to get an itemized accounting of the product.” II RP 85; ex. 7. This merchandise totaled \$942.21 without tax. II RP 86, 93.

On cross-examination, Mr. Byron testified that two of the women he saw left the store before the other two. II RP 89. He did not observe them again until he was summonsed to the Mall by the police. II RP 90. There, he recognized four of the five people-who were outside of the vehicle- that were detained. II RP 92, 95.

Robert Potter testified that in December 2004 he was a relief manager for Big 5 Sporting Goods. II RP 97. On December 18, 2004 he was first notified by the police that they “...had recovered a substantial amount of merchandise from our store.”*id.* Potter testified: “ The product was brought in. We itemized it, made a list of it in the office with the officer present. II RP 98. He identified exhibit 21 as the list he made that night that was generated from the bar codes by the computer. II RP 99. He made the notation: “3 pages, 69 items.” The total was \$2,390.39 before taxes. *id.*

Potter then identified exhibits 13 through 20 as “...surveillance video stills of the front register and front entrance to the Silverdale store....” II RP 101. This originated from a continuous videotaping of the store that contained the entire day. II RP 103.

Kenneth Smith testified he was a detective for the Kitsap County Sheriff's Department. II RP 107. He identified exhibits 13 through 20 as still videos that he made from Toys R Us surveillance tape. II RP 111; exhibit 33. He identified exhibit 32 as a DVD containing five separate segments or snippets taken from exhibit 33. These were described as: "It's a selected sample from entry time point where the individuals entered the store to the exit time point where the individuals exited the store." RP 112.

On cross-examination he admitted that exhibit 33- the VHS tape- came from Big 5 and not from Toys R Us. II RP 114.

Debra Skinner testified that she was a senior customer service specialist for JC Penney at their Silverdale, Washington store at the Kitsap Mall. II RP 118-9. On December 18, 2004 she was notified by the Lost (sic) prevention manager of two suspicious females in their junior's department. She started following them. II RP 119-20. They were carrying "two large bags that were not JC Penney brand bags." II RP 120. One of the bags was full. In one of the bags an ink tag or security devise from JC Penney was visible. *id.*

They walked toward the men's department. There, the one who was Hispanic asked a sales associate if she could use their telephone. She placed her bag down, used the telephone and then exited the store with an African American female. They both left with no bags.

Skinner testified that when the two women were observed in the junior's department she "...glanced up and saw three other girls." II RP 122. Later, after being contacted by the police and learning about the Toys R Us incident did she surmise that "...it was a group of five of them that we realized that they were all together." *id.*

Skinner retrieved the two bags left in the store. She scanned the merchandise with their "ticketing reading gun". She then rang it up like a sale. She identified exhibit 34 as the receipt she generated. The goods totaled \$912.01. II RP 126. This did not include the items left inside the store in the two bags.

On cross-examination she testified that she reached the conclusion that the five people were together based on what the police had informed another employee of her store and who in turn informed her. II RP 129.

Andrew A. Aman testified that on December 18, 2004 he responded to a call involving a white Chevrolet Tahoe. III RP 138. He photographed exhibits 23 through 31. He testified: "They show the vehicle, first and foremost, what the vehicle looked like. Then they go through with some overviews of what the contents – what the contents that were in it looked like, at the time we stopped the car." III RP 141-2.

On cross-examination he testified that these photographs depicted the Tahoe and the contents of the Tahoe before the contents were taken

out. III RP 143.

Phyllis Hagel testified that she worked at McBride's Hallmark Number 5 at the Kitsap Mall as a sales leader. III RP 151. She became aware that product consisting of ornaments was missing from the shelves. She testified; "One shelf was completely empty. It was not ornaments. And I went over to see the ornaments, and there were empty areas." III RP 155. The empty shelf contained DVDs. III RP 156.

Later, she went out to the parking lot and she observed "product all over the ground. And a lot of it was ours." III RP 157. The items she observed had Hallmark labels on them and McBride's label as well as other product with the store's price tags on them. III RP 157-8.

She carried the product back to the store. There, she made a list of the items and ran the UPC code and price. *Id.* She identified exhibit 35 as an inventory list "...of the prices of everything that I brought in from the parking lot." III RP 159. The total amount of the items that she tallied was \$917.41. III RP 150.

On cross-examination, she testified that she never saw any individual or group of people gather the subject items and walk out of the store with them. III RP 161.

Jeff Schaefer testified that he was a deputy sheriff for Kitsap County. III RP 163. When he arrived he "just started unloading the truck,

making piles of all of – different merchandise that was in there, based on what retailer it appeared to come from.” III RP 164.

Each store was contacted to have a representative come out to the pile in the parking lot and to make an itemized receipt for the sheriff. III RP 165. On cross-examination he testified that the representative physically picked up their property with the understanding of providing a receipt the next day. III RP 166. He testified that he did not actually inventory any of the items that were removed from the vehicle. III RP 167.

Angelina Gonzales testified that she was age 24 and resided in Seattle. III RP 169. She plead guilty to Theft in the Second Degree, possession of Stolen Property in the First Degree, Possession of Stolen Property in the Second Degree, and Possession of Stolen Property in the Second Degree arising out of this incident at the Kitsap Mall. III RP 170.

She testified that she had known the defendant, Charrita Noble, for the past five or six years. *id.* She testified that on December 18, 2004 she drove a Chevy Tahoe with Charrita Noble and Charrita’s two cousins and aunt to the Kitsap Mall. III RP 171.

Initially she was with Michelle. III RP 174. Later she was with Sheron- who “was taking stuff”- from Penney’s. III RP 176. They left and went to the car and then returned to Penney’s. III RP 177-8. At that time

she saw Charrita with the other two females. III RP 178. They left the Mall and Charrita drove to Big 5. III RP 179.

Everybody went inside Big 5 Sports. III RP 180. Charrita carried a bag. *id.* After that they went to Toys R Us. III RP 181. They went inside the store together. She saw Charrita with a bag. *id.* She testified that she saw Charrita put something in the bag she had. *id.* She saw the other women put things in their bags as well. III RP 182.

Then there was “a big commotion”. *id.* Everybody left the store separately. They all eventually ended up in the car. III RP 183. She testified that Charitta was driving the car when they were pulled over. *id.*

On cross-examination she testified that Charrita went out the door to Toys R Us first. *id.* She followed and was accompanied by Michelle. Bridget was behind them and Sheron was last. III RP 183-4. She testified that Sheron was pushing a cart out the door. III RP 185.

She also testified that the bags that were taken to the front of the store at Toys R Us belonged to Michelle and her and did not include the bag that Charrita had. III RP 186.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO DISMISS COUNTS II-IV.

At the conclusion of the trial, the defense moved the court to

dismiss counts II, III and IV based on lack of evidence. III RP 199. The defense relied on the case of *State v. Plank*, 46 Wn. App. 728, 731 P.2d 1170 (1987). The trial court denied the defendant's motion. III RP 202.

The defendant's motion was in the nature of a directed verdict. In reviewing a trial court decision, the appellate court applies the same standard as the trial court: "Whether there is sufficient evidence that would support a verdict. *State v. Longshore*, 97 Wn.App. 144, 147, 982 P.2d 1191 (1999). According to the decision in *Longshore*:

“([E]vidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the crime charged beyond a reasonable doubt..)”

(quoting *State v. Bourne*, 90 Wn.App. 963, 968, 954 P.2d 366 (1998)).

The defense argued in the case at bench as follows:

“To convict my client, either as the principle (sic) or the accomplice, she has to be in possession of stolen property – even if it is proven it's stolen – proximity to the property is not enough without more evidence to find her guilty of actual possession of stolen property. At most she's sitting in a car where there is arguably stolen property. There's no evidence linking her to it. There's no specific evidence of where the location of the specific items of stolen property are in the vehicle, in relation to her.” III RP 200-1.

In *State v. Plank*, supra, the Court of Appeals held that there was insufficient evidence that Killion, the passenger, possessed the automobile. Both he and the driver Plank were convicted of possession of stolen

property in the second degree- after they were arrested in the stolen vehicle. According to the holding and reasoning set forth in *State v. Plank*, the state failed to prove the Killion had dominion and control over the vehicle. *id.* at 731.

In support of its decision the Court of Appeals relied on several other cases to indicate that there was not sufficient evidence that would enable any rational trier of fact to have found the essential elements of possession of stolen property beyond a reasonable doubt. *id.* at 733 (citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)).

In *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969) drugs were found on a houseboat. “When the search warrant was executed, the defendant was sitting at a desk with another individual and a cigar box filled with various drugs was on the floor between the two men.... Defendant admitted he had handled the drugs earlier in the day. The Supreme Court held that this was not sufficient evidence to support a finding of dominion and control.” *id.* at 731-2.

In order to convict the defendant of possession of stolen property the state must prove: (1) that the defendant possessed the property, (2) that the property was stolen and (3) that the defendant knew that the property was stolen. Since there was no evidence of a plan in the case at bench, it was not shown what property Noble knew had been stolen. There was

no testimony that she knew how the property obtained by others was procured.

Also, and as argued by the defense, there was no evidence that Noble possessed any of the stolen property- even though she was in close proximity to the goods- such as in *State v. Plank* and *State v. Callahan*.

According to *State v. Callahan*:

“ Possession of property may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” *id.* at 29.

The defense argued in the case at bench that there must be more than proximity to the allegedly stolen items: “Proximity to the property is not enough.”. III RP 201.

Noble did not have dominion and control over the goods. In *State v. McCaughey*, 14 Wn.App. 326, 541 P.2d 998 (1975) the defendant was convicted by a jury of grand larceny (possession of stolen merchandise). On appeal, he argued that the trial court erred in denying his motion in arrest of judgment or, in the alternative for a new trial, based in part on his contention that the evidence was insufficient to support the jury’s verdict.

McCaughey was found asleep by a deputy sheriff 5-10 feet from a station wagon near Interstate 5. He was with another person who said he

was the owner of the vehicle and was from California. Both men were arrested when a license check revealed that the plates had been issued to another vehicle. "An inventory of the station wagon revealed factory-packaged stereo equipment...Subsequent investigation revealed that the stereo equipment had been stolen 2 days previously from a store in Portland." *id.* at 327.

The *McCaughey* court reversed the defendant's conviction. It unanimously reasoned, as the defense argued to the trial court here:

"The inference that McCaughey had recently been in the station wagon established only that he had access to the stereo equipment. However, mere proximity to the stolen merchandise is not enough to establish dominion and control over the merchandise or the vehicle. *State v. Mathews*, 4 Wn. App, 653, 484 P.2d 942 (1971)."

id. at 329. The court held: "Steven McCaughey did not have actual, physical or personal possession of the merchandise, nor did he possess the merchandise constructively -possession in law." *id.*

Looking at the evidence in the light most favorable to the state in the case at bench, the evidence showed that Noble had access to the stolen merchandise as in McCaughey. Also, it was not argued in McCaughey that he must have known during the trip from Portland to Seattle that the stereo equipment was stolen.

In *State v. Mathews*, *supra*, the four occupants of the vehicle had

driven from Portland, Oregon and were stopped in Longview, Washington. The defendant was found guilty of possession of heroin. He was an occupant of the motor vehicle where a small paper package containing a balloon capsule filled with the heroin was found underneath the carpet near the right back seat of the car. Also, in an empty space underneath the right back seat, officers found a brown paper bag containing drug paraphernalia. The defendant occupied the back seat on the right side.

The *Matthews* court stated the test on review:

“Whether a passenger’s occupancy of a particular part of an automobile would constitute dominion and control of either the drugs or the area in which they are found would depend upon the particular facts in each case. Mere proximity to the drugs is not enough to establish constructive possession- it must be established that the defendant exercised dominion and control over either the drugs or the area in which they were found.” *id.* at 656.

Here, it was not shown that Noble had dominion and control over any of the specific goods or of the area in which they were found. The state did not prove or introduce any testimony of where the various occupants were located inside the vehicle when it was stopped. And the prosecutor did not introduce any evidence where the goods were located within the vehicle. This was the same argument that Ms. Nobel’s attorney argued when he presented the motion to dismiss after the state rested:

“There’s no specific evidence of where the location of the specific items

of stolen property are in the vehicle, in relation to her.” III RP 200-1.

The trial court erred when it denied the defendant’s motion to dismiss. The defense argued during hearing on its motion: “Proximity to the property is not enough.” III RP 201. This is further borne out by *State v. Cote*, 123 Wn.App. 546, 96 P.3d 410 (2004). The police investigated a stolen vehicle. An occupant of a residence-who was wanted on arrest warrants-testified that the defendant arrived at the house as a passenger- in what was later to be determined to be- a stolen truck .

“A syringe and components of a methamphetamine lab, including two Mason jars containing various chemicals, were found in the stolen truck. Mr. Cote’s fingerprints were found on the Mason jars.” *id* at 548. After citing and quoting *State v. Green*, 94 Wn.2d at 220-22 , the court stated part of the test on review:

“The elements of a crime may be established by either direct or circumstantial evidence. *State v. Gosby*, 85 Wn.2d 758 ,765-66, 539 P.2d 680 (1975). In conducting this review, we draw all reasonable inferences in favor of the State. *State v. Partin*, 88 Wn.2d 894, 906-07, 567 P.2d 1136 (1977).” *id.* At 548-49.

The issue was framed by the court and decided against the state.

The defendant’s conviction was reversed even where the contraband had the defendant’s fingerprints on the evidence:

“Mr. Cote was not in possession of the contraband upon his arrest. The question is whether the evidence that he

was a passenger in the truck where the contraband was found, coupled with his fingerprints on the Mason jars, is sufficient to establish constructive possession.” *id.* At 549.

According to *Cote*, the state must prove that the defendant either actually or constructively possessed the contraband. *State v. Roberts*, 80 Wn.App. 342,353, 908 P.2d 892 (1996). Again, proximity to the contraband is insufficient proof. *State v. Davis*, 117 Wn.App. 702,708-09, 72 P.3d 1134 (2003), *review denied*, 151 Wn.2d 1007 (2004) (citing *State v. Bradford*, 60 Wn.App. 857,862, 808 P.2d 174 (1991)).

An accused may even handle the illicit evidence and not be found guilty of possession as in *State v. Callahan*, 77 Wn.2d at 31. According to *State v. Plank*, 46 Wn.App. at 733, the fact that the defendant is a passenger in a vehicle is not sufficient evidence of dominion and control over goods. Of importance in *Cote* was the fact that:

“There is also no evidence indicating that the Mason jar containing Mr. Cote’s fingerprints was found in the passenger area of the truck. The officer indicated it was in the “back of the stolen pickup”. Moreover, the fingerprint on the jar proves only that Mr. Cote touched it. See *Spruell*, 57 Wn.App. At 386.”

State v. Cote 123 Wn.App. at 550 (citing *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990)). In the case at bench Officer Grauke testified that he did not request any fingerprinting from any of the boxes or toys or other goods. I RP 59.

In *Spruell*, a search warrant was executed at his home. The police entered using a battering ram. Two men including Luther Hill were in the kitchen. McLemore was seated at the kitchen table. Hill had just moved from the table. A few seconds after the police entered the front door, a detective heard what sounded like a plate hit the back door. Later, white powder residue was discovered alongside the door, in the doorjam and on a plate located near the door. Hill's fingerprint was found on the plate. "There was insufficient powder residue on the plate for testing." *id.* At 384.

Hill's conviction for possession of heroin was reversed. The court found that there was not sufficient evidence that Hill had possession. The *Spruell* court observed:

"*Callahan* appears to hold that where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." *id.* At 388.

The court held:

"Our case law makes it clear that presence and proximity to the drugs is not enough. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves. *id.* At 389.

Factually of note was the court's observation:

"There is no evidence in this case involving Hill

other than the testimony of his presence in the kitchen when the officers entered and the testimony of the conditions there described [by two detectives].” *id.* At 388.

II. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF COUNTS I-IV.

According to *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109

(1986):

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is “Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216,221, 616 P.2d 628 (1980).”

See also, *State v. Rempel*, 114 Wn.2d 77,82, 785 P.2d 1134 (1990); *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia*:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”

443 U.S. at 316, 99 S.Ct. At 2787 (citing *In re Winship*, 397 U.S. 358,

90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).¹

A. Count I: Theft in the Second Degree

The defendant was charged with Theft in the second degree of property or services belonging to Toys R Us Silverdale as a principal or as an accomplice. CP 11-12. The defense pointed out during closing argument that there was no evidence from Angelina Gonzales about preparation to go to the Kitsap Mall or a plan. III RP 226-27. She testified as follows:

Q. Okay. Now is she [defendant] a good friend of yours? An acquaintance?

A. Past tense, was, I guess.

Q. Okay. Now did you guys – did you and her discuss and I don't mean to talk about anybody else – but did you and her discuss what you were going to do at the mall? Were you just going shopping? Did you know what you were going to do?

A. No.” III RP 173.

Thus, there was no evidence of intent. “[S]omething more than presence alone plus knowledge of on-going activity must be shown to establish the intent requisite to finding [an accused] to be an accomplice.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) (citing *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588

¹ The above stated cases apply to each separate argument in subsections A,B,C and D. Likewise, any case cited within subsections A,B,C or D applies to all four subsections.

P.2d 1161 (1979)). According to *In re Wilson, supra*: “It is not the circumstance of “encouragement” in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting.” 91 Wn.2d at 492.

Looking at the evidence in the light most favorable to the state creates a conflict in the testimony. Stephen Byron, the manager of Toys R Us, identified the defendant as one of two people he accompanied outside when he was shown a photograph of the defendant in open court. II RP 83; ex. 5. The defendant was identified as a person who said: “I’m going to get my Glock.” II RP 80. Sheron Noble was identified as the older person who pushed the cart outside the store. I RP 81-2.

However, it was brought out on cross-examination that Mr. Byron was shown the photographs of the women before he testified and before he made his in court identification. II RP 90-1. The prosecutor told him before he testified: “These are going to be put into evidence.” and “These are the pictures I’m putting into evidence.” II RP 91.

Byron was then asked in open court by the prosecutor:

“Q. Do you see the person on there – recognize the person that talked to you about the Glock?”

A. That would be Charrita Noble.

MR. MITHCELL: May the record reflect Mr. Byron has identified the person in Exhibit No. 5, Charrita Noble.” II RP 83.

Exhibit 5 was described during closing argument as: “The photos, Exhibit No. 5, Charitta Noble, says: Race/sex: Black female, Charrita Chanaye Noble, name of record, Page 1 of 2. Date of birth/age: 7/2/79, 25. Height: 5', weight 130. Hair: Black. Eye: Brown” III RP 240.

The defense soon thereafter argued during closing argument:

“Well, but then on cross examination we find out that he gets handed – before he come in, he gets handed the photos of the individuals with their names on them and is told that this is the trial of Charitta Noble. So, Sir, is that Charrita Noble? Yes, that’s her. It just doesn’t make a lot of sense that he could figure that out, an individual who admittedly can’t even tell race – I mean, he apparently is not that observant of people on how he sees them. He could give very little detail. Before the photograph came out, when he was asked to describe them, he really couldn’t say anything about these people. But when he’s handed a photo of the person that he’s asked to identify in court, right before he comes walking in, that’s a pretty easy call. And it doesn’t make him a liar. It doesn’t make him a bad person. But that’s common sense. That’s where you need to use your common sense. Is anybody in this world going to pick out somebody else? There’s only one black person in the room when he’s asked to pick her out. There’s only one black person, female, in the room named Charita Noble sitting next to the defense attorney. Common sense says, and pressure of sitting in that chair, that’s the person you’re going to pick. That’s how you use your common sense to evaluate the evidence. You don’t make up evidence. You evaluate the evidence that’s before you.” III RP 242-3.

By comparison in *State v. Sanford*, 128 Wn. App. 280, ___ P.3d ___ (2005)

the defendant’s conviction was reversed and the case was remanded for a

new trial. There, the trial court erroneously admitted testimony of a police officer that he used a patrol car's computer to view booking photographs that included a photo associated with the defendant when he initially gave the name of Chris Smith. The officers returned to "Smith's" house and arrested Jason Sanford for fourth degree assault- domestic-violence.

Officer Graunke, who initially stopped the suspect vehicle, was asked during his examination by the prosecutor:

Q. Deputy, I'm showing you a couple of documents that are marked for identification purposes as Plaintiff's Exhibits 1,2,3,4 and 5. Do you recognize these?

A.. Yes. These appear to be booking photos from our jail." I RP 35.

Graunke testified that five people emerged from the vehicle. *id.*

Then, during Mr. Byron's testimony, the prosecutor directed:

Q. Mr. Byron, I'm showing you Exhibits 1,2,3, and 4. Let me ask you, do you remember are those – do those appear to be the same four people that you saw that night?

A. Yeah, it looks like it.... II RP 83.

Mr. Byron had previously testified that he observed what he saw inside his store:

Q. And then what did you see, when you got to the kitchen aisle?

A. There were four ladies there. A couple of them were kneeling down, and one had a cart. And they were stuffing toys into bags, like giant gift bags, garbage bags, that kind of stuff." I RP 76.

After being shown the first four photographs, exhibits 1 through

4, Byron was then asked:

Q. Do you see the person on there – recognize the person that talked to you about the Glock?

A. That would be this Charrita Noble.

MR. MITHCELL: May the record reflect Mr. Byron has identified the person in Exhibit No. 5, Charitta Noble.”

II RP 83. (See appendix for copies of I RP 82-3).

Case law has shown that eye witness identification may tend to be unreliable in stressful situations. See generally, *State v. Moon*, 45 Wn. App. 692, 726 P.2d 1253 (1986), *appeal after remand*, 48 Wn. App. 647, 739 P.2d 1157 (1987). Byron testified that when he went to the arrest scene he was not able to identify one of the passengers. He described her on cross-examination: “She was slightly heavy set, I don’t know how tall she was, because she was sitting down, dark hair, darkly complected.”

I RP 92.

It was not shown that Charitta Noble took any particular item from Toys R Us or any item having a value “exceeding \$250 in value.”. Instr. No. 8, CP 68; RCW 9A.56.020(1)(a); RCW 9A.56.040(1)(a). Her only criminal accountability would be if there was sufficient evidence that she acted as an accomplice.

B. Count II: Possession of Stolen Property in the First Degree

The defendant was charged with Possession of Stolen Property in the First Degree as a principal or as an accomplice by knowingly receiving

or possessing or disposing of merchandise from Big 5 Sporting Goods. CP 12.

No one from Big 5 Sporting Goods knew that any merchandise was taken from the store on December 18, 2004. Robert Potter testified that he was first notified by the police that they had recovered merchandise from the store. II RP 97. There was no video tape of anyone taking the subject merchandise. III RP 241-2.

The defense argued to the jury that there was no evidence to show that the defendant was included in the group exiting the Big 5 Store on the video tape: “It is not clear enough to tell who these people were.” III RP 239; ex. 33. Angelina Gonzales did not testify who the people were on the video tape. III RP 239-40 The videotape showed a person carrying out a big bag. That person had “a little tiny pony tail of hair, tightly pulled back.” III RP 241. The defendant’s hair style on the day of the incident was in corn rows described by the defense as “dangly braids.” *id.*

The state’s purported accomplice testimony by Angelina Gonzales did not implicate the defendant at the Big 5 store. Gonzales testified that when the group left the Kitsap Mall, Charrita drove to the Big 5 location. She testified that Charrita went into the store with a big bag. But she did not testify- and no Big 5 employee testified- that they saw the defendant take any goods or that Noble was seen assisting anyone else while

merchandise or any product was stolen.

WPIC 10.51 as used in this relation to this count-as well as all other counts- states in part in instruction No. 21:

“A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.”

CP 81; Instructions Nos. 19, 23 and 25; CP 79, 83 and 85; Accord, *State v. Alsup*, 75 Wn.App. 128, 876 P.2d 935 (1994) (more than presence and knowledge of criminal activity must be shown to establish that a person is an accomplice); *State v. Luna*, 71 Wn.App. 755, 862 P.2d 620 (1993) (mere presence at the scene, even if coupled with assent to it, is not sufficient to prove complicity); *State v. Ferreira*, 69 Wn.App. 465, 850 P.2d 541 (1993) (a person’s physical presence and assent alone are insufficient to establish accomplice liability); *State v. Everybodytalksabout* 145 Wn.2d at 471-3 (under accomplice liability the State is required to prove that an accomplice “actually participated in the crime.”).

C. Count III: Possession of Stolen Property in the Second Degree

The defendant was charged with knowingly receiving, possessing, concealing or disposing of stolen property belonging to JC Penney as a principal or as an accomplice with a value of over \$250.00. CP 12.

The defense argued that looking at the evidence in the light most

favorable to the state would show that there was no evidence that Ms. Noble took anything from JC Penney or that she was an accomplice. The defense argued that the evidence showed that there were two groups of women. Inside the store were a pair of women that included Angelina Gonzales and three other women that included the defendant. The state's evidence showed from two different witnesses that the pair of women- acting together- disposed of two bags of merchandise and ran out of the store.

Gonzales testified that she was with Sheron at JC Penney's. III RP 176. They actually left the mall together and then returned. It was at that time that she saw the defendant with the other two females. III RP 178. She did not testify that the defendant assisted her or Sheron when merchandise was stolen. Neither did she testify that she ever saw Charrita take anything from JC Penney's. Nobody from JC Penney's called the police because no employee ever saw anyone take anything out of the store. II RP 121-23.

There was no evidence from anyone that the defendant was involved. Looking at the evidence in the light most favorable to the State would focus on the testimony of Debra Skinner. She testified as follows:

“Q. Okay. Now, did you see any other people in there that you realized may have been with these people?

A. At one point, when we were still in the junior's depart-

ment, Michelle indicated to me --

MR. TALNEY: Objection, Your Honor.

THE COURT: Yes. Just what you did, not who told you.

THE WITNESSES: Oh. I glanced up and saw three other girls.

BY MR. MITCHELL:

Q. Okay. Could you describe those other three?

A. No. I just glanced up quickly. And then the other two started walking off, so we were following our merchandise.

Q. Was there anything that led you to believe that the three and the two might have been together?

A. Not right off, no. Afterwards.

Q. Okay. What happened afterwards. What do you mean afterwards? What made you think that they were together?

A. Not until Toys R Us and the police notified us that they had our merchandise and it was a group of five of them that we realized that they were all together.

Q. Now, in the store, did you see the other group of three? Did they have any bags or anything on them, at that time?

A. Unfortunately, I was not aware of anything, at that time.

II RP 121-22.

There was no evidence that Ms. Noble acted as an accomplice at JC Penney's. The accomplice instruction used in this case defines what an accomplice is. Instruction No. 23 stated in part:

“A person is an accomplice in the commission of the crime of Possession of Stolen Property in the Second Degree as charged in Count III if, with knowledge that it will promote or facilitate the commission of the crime of Possession of Stolen Property in the Second Degree as charged in Count III, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime of Possession of Stolen Property in the Second Degree as charged in Count III; or
- (2) aids or agrees to aid another person in planning or committing the crime of Possession of Stolen Property

in the Second Degree as charged in Count III.” CP 83

That instruction includes the following: “However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.” III RP 228-29, Instr. No. 23, CP 83; see also *State v. Wilson*, supra, and RCW 9A.08.020.

D. Count IV: Possession of Stolen Property in the Second Degree

The defendant was charged with knowingly receiving, possessing, concealing or disposing of stolen property belonging to McBride’s Hallmark as a principal or as an accomplice with a value of over \$250.00. CP 13.

Again this court must apply the above standards of review for principal and accomplice liability and look at the evidence in the light most favorable to the state with regard to this accusation.

The defense argued that the only evidence regarding this count relating to the defendant came from Angelina Gonzales. The defense argued during closing:

“And what did she say? Well, I saw her in there. But she didn’t say, I saw her take any property. She didn’t say she saw anybody take any property. She didn’t say how the property got put in the car, whether Charrita Noble was present when the property got put in the car, whether Charrita Noble knew that the property that got put in the car while she was in the car or knew that it was in the car. That’s the facts that are necessary for knowledge. It’s

not an assumption....” III RP 232.

Gonzales testified that once they were inside the Mall, she and Michelle went to the bathroom. III RP 174. She saw Charrita inside of the Hallmark store with Bridget. III RP 175. Charrita had a party store bag. She did not see anybody put anything in a bag. III RP 176.

On cross-examination, Phyllis Hagel, the sales leader at McBride’s Hallmark Number 5, testified that she never saw any individual or group of people gather the items that were retrieved by the police and walk out of the store with them. III RP 161.

The defense argued to the jury that there was no evidence from any of the state’s witnesses of where any of the product was in relation to the defendant when she occupied the vehicle. The defense argued: “But how does she know if the Hallmark stuff is at the bottom of his pile and got put in when she wasn’t standing there, that she knows that there’s stolen property from Hallmark in that vehicle?” III RP 233.

One of the theories of the defense was that the State could not prove the element of knowledge because the deputies did not record where each occupant of the vehicle was positioned before they were required to exist the vehicle during the felony stop. *id.* And, the deputies did not diagram or record where the property was located within the vehicle in order to determine whether the defendant had actual knowledge of the

stolen product. III RP 234.

Along these lines the defense argued to the jury:

“What if the JC Penney’s property was at the bottom of the stack? What if the Toys R us property is at the bottom of the stack? They have to prove that she knew and that she was in on it; either she did it herself, or that an accomplice did it. And if it’s an accomplice that did it, she’s got be in on the plan. And there’s got to be actual evidence of her being in on the plan. Knowing and being there isn’t enough. And that’s true for each and every count.” III RP 234.

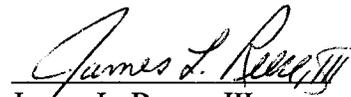
(See arguments in section I regarding constructive possession and the requirement of dominion and control over an area compared to mere proximity to the goods, which are incorporated herein by reference as if set forth in full).

D. Conclusion

This court should reverse the defendant’s convictions for Counts I-IV and remand the case for dismissal.

Dated this 30th day of July 2006.

Respectfully Submitted,



James L. Reese, III

WSBA #7806

Court Appointed Attorney
For Appellant

1 Q. What did you see, when you got there?

2 A. Well, they had them -- they were, like, stuck
3 in -- it's Christmastime. The mall is just loaded with
4 cars. And they were, like, stuck in the middle of one of
5 the places you go to park. And they had cop cars on either
6 side of them. And they were in various vehicles. And he
7 had looked inside this SUV-looking thing to see what was in
8 there, and it was a lot of stuff.

9 Q. Did you see the people --

10 A. Uh-huh.

11 Q. -- that were in the store?

12 A. Yeah.

13 Q. Were they the same people that you saw in your
14 store?

15 A. Yes.

16 MR. MITCHELL: May I approach the witness, Your Honor?

17 THE COURT: You may.

18 BY MR. MITCHELL:

19 Q. Mr. Byron, I'm showing you Exhibits 1, 2, 3,
20 and 4.

21 Let me ask you, do you remember are those -- do those
22 appear to be the same four people that you saw that night?

23 A. Yeah, it looks like it.

24 Q. Do you recognize the person you described as the
25 older person that you were in contact with?

BYRON - Direct (by Mr. Mitchell)

A

1 A. I believe it was this gal here, this Sheron.

2 MR. MITCHELL: Your Honor, may the record reflect that
3 Mr. Byron has pointed to the person in Exhibit 2,
4 Ms. Sheron Noble.

5 BY MR. MITCHELL:

6 Q. Do you see the person on there -- recognize the
7 person that talked to you about the Glock?

8 A. That would be this Charrita Noble.

9 MR. MITCHELL: May the record reflect Mr. Byron has
10 identified the person in Exhibit No. 5, Charrita Noble.

11 BY MR. MITCHELL:

12 Q. Do you see -- or did you have any interaction
13 with the other people?

14 A. Not -- I mean, in the store. They were there,
15 because they were all in that same aisle. But at that
16 point, they were gone.

17 MR. MITCHELL: May I approach?

18 THE COURT: You may.

19 BY MR. MITCHELL:

20 Q. Mr. Byron, do you see Charrita Noble in the
21 courtroom today?

22 A. The gal right over there.

23 Q. When you say, "The gal over there," what color
24 shirt is she --

25 A. She's wearing a green jacket.

INSTRUCTION NO. 19

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime of Theft in the Second Degree as charged in Count I if, with knowledge that it will promote or facilitate the commission of the crime of Theft in the Second Degree as charged in Count I, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime of Theft in the Second Degree as charged in Count I; or

(2) aids or agrees to aid another person in planning or committing the crime of Theft in the Second Degree as charged in Count I.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 21

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime of Possession of Stolen Property in the First Degree as charged in Count II if, with knowledge that it will promote or facilitate the commission of the crime of Possession of Stolen Property in the First Degree as charged in Count II, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime of Possession of Stolen Property in the First Degree as charged in Count II; or

(2) aids or agrees to aid another person in planning or committing the crime of Possession of Stolen Property in the First Degree as charged in Count II.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 23

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime of Possession of Stolen Property in the Second Degree as charged in Count III if, with knowledge that it will promote or facilitate the commission of the crime of Possession of Stolen Property in the Second Degree as charged in Count III, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime of Possession of Stolen Property in the Second Degree as charged in Count III; or

(2) aids or agrees to aid another person in planning or committing the crime of Possession of Stolen Property in the Second Degree as charged in Count III.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 25

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime of Possession of Stolen Property in the Second Degree as charged in Count IV if, with knowledge that it will promote or facilitate the commission of the crime of Possession of Stolen Property in the Second Degree as charged in Count IV, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime of Possession of Stolen Property in the Second Degree as charged in Count IV; or

(2) aids or agrees to aid another person in planning or committing the crime of Possession of Stolen Property in the Second Degree as charged in Count IV.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

RCW 9A.08.020

Liability for conduct of another — Complicity.

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

[1975-'76 2nd ex.s. c 38 § 1; 1975 1st ex.s. c 260 § 9A.08.020.]

Notes:

Effective date – 1975-'76 2nd ex.s. c 38: "This 1976 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1976." [1975-'76 2nd ex.s. c 38 § 21.]

Severability – 1975-'76 2nd ex.s. c 38: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 38 § 20.]

RCW 9A.56.020

Theft — Definition, defense.

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

[2004 c 122 § 1; 1975-'76 2nd ex.s. c 38 § 9; 1975 1st ex.s. c 260 § 9A.56.020.]

Notes:

Effective date -- Severability -- 1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

Civil action for shoplifting by adults, minors: RCW 4.24.230.

RCW 9A.56.040

Theft in the second degree — Other than firearm.

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) two hundred and fifty dollars in value other than a firearm as defined in RCW 9.41.010, but does not exceed one thousand five hundred dollars in value; or

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant; or

(c) An access device; or

(d) A motor vehicle, of a value less than one thousand five hundred dollars.

(2) Theft in the second degree is a class C felony.

[1995 c 129 § 12 (Initiative Measure No. 159); 1994 sp.s. c 7 § 433; 1987 c 140 § 2; 1982 1st ex.s. c 47 § 15; 1975 1st ex.s. c 260 § 9A.56.040.]

Notes:

Findings and intent — Short title — Severability — Captions not law — 1995 c 129: See notes following RCW 9.94A.510.

Finding — Intent — Severability — 1994 sp.s. c 7: See notes following RCW 43.70.540.

Effective date — 1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460: See note following RCW 9.41.010.

Severability — 1982 1st ex.s. c 47: See note following RCW 9.41.190.

Civil action for shoplifting by adults, minors: RCW 4.24.230.

RCW 9A.56.140

Possessing stolen property — Definition — Presumption.

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of such stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen.

(5) In any prosecution for possessing stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

[2004 c 122 § 2; 1998 c 236 § 3; 1987 c 140 § 3; 1975 1st ex.s. c 260 § 9A.56.140.]

RCW 9A.56.150

**Possessing stolen property in the first degree — Other than
firearm.**

(1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property other than a firearm as defined in RCW 9.41.010 which exceeds one thousand five hundred dollars in value.

(2) Possessing stolen property in the first degree is a class B felony.

[1995 c 129 § 14 (Initiative Measure No. 159); 1975 1st ex.s. c 260 § 9A.56.150.]

Notes:

Findings and intent — Short title — Severability — Captions not law — 1995 c 129: See notes following RCW 9.94A.510.

RCW 9A.56.160

Possessing stolen property in the second degree — Other than firearm.

(1) A person is guilty of possessing stolen property in the second degree if:

(a) He or she possesses stolen property other than a firearm as defined in RCW 9.41.010 which exceeds two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value; or

(b) He or she possesses a stolen public record, writing or instrument kept, filed, or deposited according to law; or

(c) He or she possesses a stolen access device; or

(d) He or she possesses a stolen motor vehicle of a value less than one thousand five hundred dollars.

(2) Possessing stolen property in the second degree is a class C felony.

[1995 c 129 § 15 (Initiative Measure No. 159); 1994 sp.s. c 7 § 434; 1987 c 140 § 4; 1975 1st ex.s. c 260 § 9A.56.160.]

Notes:

Findings and intent -- Short title -- Severability -- Captions not law -- 1995 c 129: See notes following RCW 9.94A.510.

Finding -- Intent -- Severability -- 1994 sp.s. c 7: See notes following RCW 43.70.540.

Effective date -- 1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460: See note following RCW 9.41.010.

AMENDMENT (XIV)

ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LIABILITY FOR CONDUCT OF ANOTHER **WPIC 10.51**

10.50

LIABILITY FOR CONDUCT OF ANOTHER—COMPLICITY

Analysis of Instructions

**Instruction
Number**

Accomplice—Definition 10.51

Library References:

C.J.S. Criminal Law §§ 127 et seq., 998 et seq.
West's Key No. Digests, Criminal Law ¶59 et seq., 792.

WPIC 10.51

ACCOMPLICE—DEFINITION

[A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.]

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing a crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

